Supreme Court
FILED

No. 04-~~04~~ 514

OCT 14 2004
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In The

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1 TO 201

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CAPITAL CASE
QUESTIONS PRESENTED

I.

By withholding issuance of its mandate affirming the denial of habeas corpus relief for more than six months beyond the time for mandatory issuance under Fed. R. App. P. 41(d)(2)(D) and then by issuing a new opinion and judgment remanding the case to the district court for further proceedings in light of materials contained in a post-judgment motion filed by the respondent under Fed. R. Civ. P. 60(b), did the Sixth Circuit violate the terms of 28 U.S.C. §2244(b)?

II.

Did the Sixth Circuit abuse its discretion by withdrawing its opinion affirming the denial of habeas corpus relief six months after Fed. R. App. P. 41(d)(2)(D) made issuance of the mandate mandatory, without notice to the parties or any finding that the court's action was necessary to prevent a miscarriage of justice, particularly where state judicial proceedings to enforce the inmate's death sentence had progressed in reliance upon the finality of the judgment in the federal habeas proceedings?

III.

By remanding the case for a "full evidentiary hearing" on respondent's initial habeas corpus petition without any determination that the conditions prescribed in 28 U.S.C. §2254(e)(2) were met, did the Sixth Circuit violate the terms of AEDPA and this Court's decision in *Williams v. Taylor,* 529 U.S. 420 (2000)?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Tennessee, on behalf of Ricky Bell, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit withdrawing its opinion filed January 9, 2003, and remanding this capital federal habeas corpus case to the United States District Court for the Eastern District of Tennessee for further proceedings.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1) that is the subject of this petition is published at 373 F.3d 688. The earlier opinion of the court of appeals affirming the district court's denial of habeas corpus relief (App. 117) is reported at 315 F.3d 566. The memorandum opinion of the district court dismissing Thompson's petition for writ of habeas corpus (App. 202) is unreported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on June 23, 2004.[1] (App. 1) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[1] On September 17, 2004, Justice Stevens granted petitioner's application to extend the time to file a petition for writ of certiorari from September 21, 2004, until October 14, 2004. *Bell v. Thompson*, No. 04A211.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(b)(1), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA), provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

Rule 41(d)(2), Federal Rules of Appellate Procedure, provides in pertinent part:

> (A) A party may move to stay the mandate pending the filing of a petition for writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause.
>
> * * *
>
> (D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

STATEMENT OF THE CASE

I. Procedural History

Respondent Gregory Thompson ("respondent" or "Thompson") was convicted in 1985 by a jury in Coffee County, Tennessee, for the first degree murder of Brenda Blanton Lane on New Year's Day of that same year. At a separate sentencing hearing, the jury sentenced Thompson to death after finding three aggravating circumstances

beyond a reasonable doubt: (1) that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; (2) that the defendant committed the murder for the purpose of avoiding or preventing his lawful arrest and prosecution; and (3) that the murder was committed while the defendant was engaged in committing robbery or kidnapping. Tenn. Code Ann. §39-2-203(i)(5), (6), (7) (1982) (repealed). The Tennessee Supreme Court affirmed the judgment, *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), and this Court denied certiorari. *Thompson v. Tennessee*, 497 U.S. 1031 (1990).

In October 1990, Thompson filed a petition for post-conviction relief in state court, contending, *inter alia*, that trial counsel was ineffective for failing fully to investigate and present evidence showing that he had suffered certain head injuries that might have contributed to his commission of the offense. The post-conviction court rejected Thompson's claim following an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed the denial of the petition for post-conviction relief. *Thompson v. State,* 958 S.W.2d 156 (Tenn. Crim. App. 1997). Thompson subsequently sought permission to appeal to the Tennessee Supreme Court pursuant to Rule 11, Tennessee Rules of Appellate Procedure, but that court denied his application on October 20, 1997.

On June 12, 1998, Thompson filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee. On February 17, 2000, the district court entered an order summarily denying Thompson's claims for relief and dismissing his petition. (App. 202) Thompson appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit.

On March 1, 2001, while Thompson's appeal was pending in the Sixth Circuit, but before oral argument, Thompson filed a motion in the district court under Rule 60(b), Federal Rules of Civil Procedure, requesting the district court to "supplement" the record with additional evidence that had been developed through discovery in the federal habeas proceeding but had never been presented to the district court and, in light of that evidence, to "revisit [the court's] previous summary denial" of Thompson's habeas petition. (App. 337, 341)

Contemporaneous with the filing of his Rule 60(b) motion, Thompson filed a motion in the Sixth Circuit seeking to hold his appeal in abeyance pending the district court's disposition of the Rule 60(b) motion. (App. 333) The district court denied Thompson's Rule 60(b) motion on March 7, 2001 (App. 343), and the Sixth Circuit denied Thompson's motion to hold his appeal in abeyance on March 21, 2001. (App. 345)

On January 9, 2003, in a two-to-one decision, a panel of the Sixth Circuit affirmed the district court's denial of habeas relief. *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003). (App. 117) Thompson filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Sixth Circuit. The panel reviewed the petition and, after finding that the issues raised were fully considered upon the original submission and decision of the case, denied rehearing on March 10, 2003. (App. 346) On March 24, 2003, the court of appeals stayed the issuance of its mandate pending the filing and disposition of a petition for writ of certiorari. (App. 347)

On August 6, 2003, Thompson filed a petition for writ of certiorari in this Court. The Court denied Thompson's

petition on December 1, 2003. *Thompson v. Bell*, 124 S.Ct. 804 (2003). The following day, December 2, 2003, Thompson filed a motion in the court of appeals to extend the stay of the mandate pending a petition for rehearing in this Court from the denial of his certiorari petition. This Court's order denying certiorari was filed with the clerk of the court of appeals on December 8, 2003. The Sixth Circuit granted Thompson's motion to extend the stay of the mandate on December 12, 2003, pending the filing of a petition for rehearing and "thereafter until the Supreme Court disposes of the case." (App. 348) Thompson filed a petition for rehearing in this Court on December 22, 2003. On January 20, 2004, the Court denied Thompson's petition for rehearing. *Thompson v. Bell*, 124 S.Ct. 1162 (2004). A copy of the Court's order denying rehearing was filed with the clerk of the court of appeals on January 23, 2004.

On February 25, 2004, the Tennessee Supreme Court ordered that Thompson's death sentence be carried out on August 19, 2004. In addition, finding that Thompson had sufficiently raised the issue of his present competency to be executed through his Notice of Incompetency to be Executed and supporting exhibits, the state supreme court remanded the case to the trial court where Thompson was originally convicted and sentenced for an "expeditious determination" of his present competency. (App. 349)

On March 1, 2004, Thompson filed a "Petition Providing Notice of Incompetency to Be Executed, Requesting a Hearing on Competency to Be Executed, and Requesting an Order Finding Gregory Thompson Incompetent to Be Executed and Issuance of a Reprieve" in the state trial court. Accompanying his petition were, *inter alia*, three mental health experts' reports, all dated after this Court's

denial of certiorari, opining concerning Thompson's present competence. On March 8, 2004, the trial court denied Thompson's competency petition without a hearing, and, following expedited review, the Tennessee Supreme Court affirmed the judgment of the trial court in an opinion filed on May 12, 2004. *Thompson v. State*, 134 S.W.3d 168 (Tenn. 2004). (App. 352)

On June 14, 2004, Thompson filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee, asserting a claim of incompetency for execution under *Ford v. Wainwright*, 477 U.S. 399 (1986). On June 21, 2004, the district court granted a "brief stay" of Thompson's execution, with the stay to expire automatically upon issuance of an order of the court denying habeas relief but to remain in place upon issuance of an order granting the writ. The district court further ordered that the Warden file a response to Thompson's *Ford* petition within 10 days of the date of the order.

On June 23, 2004, the Sixth Circuit issued an opinion in which it vacated the district court's February 2000 order dismissing Thompson's initial habeas petition, supplemented the record on appeal with a deposition that had been attached to Thompson's March 2001 motion to hold his appeal in abeyance but never presented in the habeas proceedings in the district court, and remanded the case to the district court for a "full evidentiary hearing" on Thompson's initial habeas petition. (App. 5-6)

II. Facts Relevant to the Petition

1. The proof at Thompson's criminal trial and sentencing is summarized in the Tennessee Supreme Court's

decision on direct appeal. *State v. Thompson*, 768 S.W.2d 239, 243-44 (Tenn. 1989).

On December 29, 1984, Gregory Thompson and Joanne McNamara, a juvenile female, traveled by bus from Marietta, Georgia, to Shelbyville, in Bedford County, Tennessee. They presented themselves as a married couple at the home of Willa Mae Odum, an acquaintance of McNamara's family, who allowed them to stay there. When Ms. Odum learned the two were not married, she asked Thompson to leave, but he remained through the night of December 31, waiting for a relative to wire him some money. The following morning, January 1, 1985, Odum again insisted that Thompson leave, and she called the authorities to report McNamara as a runaway. This call apparently prompted the couple to depart Odum's home. Having little money and no transportation, the couple spent the afternoon at a nearby Wal-Mart store.

That same afternoon, January 1, after making several purchases at the Wal-Mart, Brenda Lane did not arrive home when expected. Shortly after midnight, Lane's automobile was reported on fire near an apartment building in Marietta, Georgia. Thompson and McNamara were arrested on the night of January 2 in connection with the investigation of Lane's disappearance. A traffic ticket in Thompson's jacket showed that he had been cited for speeding while driving Brenda Lane's vehicle on Interstate 24 in Tennessee near the Georgia line. A Wal-Mart receipt and several items recovered from the vehicle indicated a purchase at the Shelbyville Wal-Mart at 5:51 p.m. on January 1. A button found in Lane's car matched those on Thompson's clothing.

A few hours after being taken into custody, Thompson admitted that he had abducted a woman at knifepoint from the Wal-Mart in Shelbyville and forced her to drive him and his companion in her car to a remote location outside Manchester, Tennessee. There, according to Thompson, he stabbed her, drove the car over her body and left. Thompson drew a map illustrating the route from the town to the site of the stabbing and spoke with authorities by telephone to clarify certain aspects of his directions.

On January 3, 1985, following Thompson's directions, a search team found Brenda Lane's body at the location indicated in Thompson's statement. She died from multiple stab wounds to the back and, according to the pathologist, would have remained conscious five to ten minutes before bleeding to death. Apart from the stab wounds, there was no evidence of other injury or trauma to Lane's body. Thompson presented no proof in the guilt phase of trial, and the jury convicted him of the first degree murder of Brenda Lane.

During the sentencing phase, Thompson called a number of witnesses, including former high school teachers, acquaintances, his grandparents, two siblings and a cousin, who presented a picture of him as non-violent, cooperative and responsible. Witnesses described in detail his childhood and family circumstances in Georgia until he left in 1979 to join the Navy. The Tennessee Supreme Court noted in its opinion on direct appeal that, "while [Thompson's] family was poor, it was also good and loving." *Thompson*, 768 S.W.2d at 244.

Arlene Cajulao, Thompson's girlfriend while he was stationed with the Navy in Hawaii, testified that she knew

Thompson from December 1980 until June 1984. She described their relationship as good, one that she was "very proud to have experienced," and stated that Thompson was caring and sensitive. She related that Thompson had suffered a head injury when three of his fellow service members attacked him with a crowbar and that he became paranoid and unreasonably concerned about his and her personal safety thereafter. Cajulao was aware that Thompson was discharged from the Navy as a result of being court-martialed for shoving a petty officer and either dislocating the officer's shoulder or breaking his collar bone. She was also aware of other violent incidents involving Thompson and other Navy personnel. After leaving the Navy, Thompson returned to Georgia for a short time in 1983 and then in 1984 to look for work. Thompson's sister, Nora Jean Walton, and his brother-in-law testified about Thompson's activities in Georgia after he returned from the Navy, including his relationship with co-defendant Joanne McNamara.

Dr. George Copple, a clinical psychologist who interviewed and tested Thompson before trial, testified about his personality and aptitude for employment in prison. He opined that Thompson had an unusually strong need to nurture other people, which may have led, in part, to the commission of the offense in this case. Dr. Copple further testified that Thompson exhibited strong remorse for the killing and did not have adult anti-social personality.

To rebut Dr. Copple's testimony, the State presented the deposition of Dr. Robert Glenn Watson, a clinical psychologist who participated in a staff evaluation of Thompson at Middle Tennessee Mental Health Institute (M.T.M.H.I.) shortly after his arrest. Dr. Watson testified that Thompson showed little remorse and exhibited adult

anti-social behavior. He further stated that, during the pre-trial evaluation period, Thompson appeared to fake schizophrenia by claiming to hear voices and also falsely claimed that he was unable to read. *Thompson*, 768 S.W.2d at 244.

2. In post-conviction proceedings, Thompson contended that his trial counsel was ineffective for failing to investigate the head injuries he had suffered prior to the murder. He claimed that evidence of the head injuries could have been beneficial to his case in the penalty phase of his trial. Following an evidentiary hearing, the state post-conviction court rejected Thompson's claim. The Tennessee Court of Criminal Appeals affirmed the decision of the post-conviction court, finding that counsel's decision to "emphasize [Thompson's] positive qualities [at sentencing] rather than to suggest brain damage, while unsuccessful, was based upon adequate investigation." *Thompson*, 958 S.W.2d at 165. The court further found that Thompson had demonstrated no prejudice from counsel's alleged deficiencies, because he "failed to establish that the head injuries had any effect upon his mental stability at the time of the murder" and "failed to demonstrate that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Id.*

III. The Opinions Below

1. The federal district court dismissed Thompson's petition for writ of habeas corpus without a hearing. As to his claim of ineffective assistance of counsel, the district court found in pertinent part that Thompson had presented no competent evidence in response to the State's

motion for summary judgment, by way of affidavit, deposition or otherwise, demonstrating that he was suffering from a significant mental disease at the time of the offense or at trial that should have been presented to the jury during the penalty phase of his trial as mitigation evidence. (App. 270) The district court further noted that Thompson "had two different psychological evaluations [prior to trial] and both resulted in findings of competency at the time of the crime and at the time of trial." In addition, the district court found that the state-court record supported the state post-conviction court's determination that trial counsel reasonably investigated Thompson's background and mental health history. (App. 270-71)

2. In an opinion filed January 9, 2003, the Sixth Circuit affirmed the judgment of the district court. With regard to Thompson's ineffective assistance claim, the court observed that, because the Tennessee courts stated the appropriate standard established by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the question to be decided was whether the state court unreasonably applied *Strickland* to the facts of Thompson's case under 28 U.S.C. §2254(d). (App. 154) The court of appeals found that the state-court record reflected that counsel adequately investigated Thompson's mental health:

> [T]he [state court] record reflects that trial counsel investigated Thompson's mental health and that he received expert assistance to attempt to establish valid mitigating factors. The record shows that trial counsel were aware from the outset of Thompson's prior head injuries and inappropriate behavior, and that they investigated possible mental illness or defect. They requested a competency evaluation. Thompson was evaluated for thirty days by a team of experts. The

MTMHI team found no mental illness, mental defect, or insanity. Counsel also had [Dr. George] Copple, a clinical psychologist and former professor of psychology at Vanderbilt, to evaluate Thompson. Copple found no evidence of mental illness.

* * *

[N]ot one of Thompson's post-trial experts have opined that Thompson suffered from organicity or mental illness at the time of the crime or trial. [Dr. Gillian] Blair, Thompson's state post-conviction expert, also a clinical psychologist with ties to Vanderbilt, declined to give an opinion, stated simply that more information was needed. Significantly, she did not fault the testing procedures used by MTMHI or Copple, but merely stated that they were not extensive enough. Indeed, she performed many of the same tests. Similarly, neither Crown or Sultan [Thompson's federal habeas experts] ever expressed an opinion that Thompson was mentally ill at the time of the crime.

* * *

As the Tennessee Court of Criminal Appeals held, there is no prejudice because, "[t]he petitioner has failed to establish that the head injuries had any effect upon [Thompson's] mental stability at the time of the murder. Further, he has failed to establish that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Thompson*, 958 S.W.2d at 165.

* * *

Indeed, although the state court ruled on the prejudice prong of *Strickland*, its ruling is

equally sustainable under the cause prong of *Strickland* because trial counsel's decision to employ a clinical psychologist at trial was not objectively unreasonable. Further, as the Tennessee Court of Criminal Appeals concluded, "counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id.* Nor can there be prejudice because the jury was not deprived of any *actual evidence* of organicity or mental disease or defect at the time of the crime. Thus, the state court's decision holding that counsel were not ineffective under the Sixth Amendment is not an unreasonable application of *Strickland*.

(App. 158-59, 163-64)

3. Six and one-half months after this Court denied certiorari from that decision, the Sixth Circuit withdrew its January 2003 opinion and remanded the case to the district court for a "full evidentiary hearing." (App. 5-6) The court reasoned that a discovery deposition of a mental health expert taken by counsel during the federal habeas proceedings, but never submitted to the district court for consideration in connection with the warden's motion for summary judgment, was "extremely probative" in assessing Thompson's mental state at the time of the crime and, thus, relevant to his claim of ineffective assistance of counsel at sentencing. (App. 2) While acknowledging that the deposition was outside the record of the district court, the court of appeals nevertheless considered it in rendering its opinion pursuant to the court's "equitable power to supplement the record on appeal," finding that

the deposition was "apparently negligently omitted" by Thompson's habeas counsel.[2]

> Because the evidence here was apparently negligently omitted, because the evidence is so probative of Thompson's mental state at the time of the crime, because there is no surprise to [the Warden] as it was his counsel who took the deposition, and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal, despite the omission of the deposition from the District Court record. We therefore vacate the grant of summary judgment, and remand the case to the District Court for a full evidentiary hearing.

(App. 5-6) The court made no finding that Thompson was not at fault in failing to develop mental health evidence in state court or that the limitations set forth in 28 U.S.C. §2254(e)(2) were satisfied in order to justify its directive for a "full evidentiary hearing." Indeed, the court's previous opinion indicated to the contrary. (App. 169-70) As to its authority to reconsider its previous opinion, the court invoked its "inherent power to reconsider [its] opinion prior to the issuance of the mandate." (App. 6)

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[2] In his concurring/dissenting opinion, Judge Suhrheinreich found habeas counsel's explanation for the omission of the deposition to be "implausible, if not intentionally false," and thus justified the court's late intervention on grounds of a fraud upon the district court. (App. 82, 89-107) The panel majority, however, declined to join in that conclusion. (App. 2)

REASONS FOR GRANTING THE WRIT

In an opinion filed January 9, 2003, the Sixth Circuit affirmed the decision of the district court summarily dismissing Thompson's petition for writ of habeas corpus. After Thompson's petition for rehearing was denied by the Sixth Circuit in March 2003, this Court denied certiorari on December 1, 2003, and denied rehearing of that decision on January 20, 2004. Believing that Thompson's federal habeas case was once and for all final, the Tennessee Supreme Court set an execution date for August 19, 2004,[3] and ordered that the case be remanded to the trial court for an "expeditious determination" of Thompson's competence for execution under the procedures established in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).[4] (App. 349-51) The Tennessee Supreme Court thereafter affirmed the trial court's order denying a hearing on the issue of competence for execution when Thompson failed to make a sufficient threshold showing of present incompetence. *Thompson v. State*, 134 S.W.3d 168 (Tenn. 2004). (App. 352)

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[3] Tenn. Sup. Ct. R. 12.4(A) provides: "After a death-row prisoner has pursued at least one unsuccessful challenge to the prisoner's conviction and sentence through direct appeal, state post-conviction, and federal habeas corpus proceedings, the State Attorney General shall file a motion requesting that this Court set an execution date. The motion shall include a brief summary of the procedural history of the case demonstrating that the prisoner has completed the standard three-tier appeals process. The motion shall be considered premature if filed prior to the expiration of the time for filing a petition for writ of certiorari or a petition to rehear the denial of a petition for writ of certiorari in the United States Supreme Court."

[4] In *Van Tran*, the Tennessee Supreme Court adopted the standard of competency for execution in Tennessee and established state-court procedures afforded state prisoners to assert last-minute claims of incompetence under *Ford v. Wainwright*, 477 U.S. 399 (1986).

But the State of Tennessee's reliance on the apparent finality of the federal judgment was misplaced because, behind the scenes, while the State was taking steps to carry out Thompson's lawful sentence, the Sixth Circuit was conducting a second review of Thompson's habeas corpus appeal. And, on June 23, 2004, 18 months after its initial decision denying habeas corpus relief and 198 days after this Court denied certiorari, the State's efforts to carry out its sentence were suddenly blocked when the Sixth Circuit withdrew its previous opinion, expanded the appellate record with material that had not previously been properly presented to *any* court, state or federal, and, based on that material, remanded the case to the district court for an evidentiary hearing on Thompson's original habeas petition.

The Sixth Circuit attributed its actions on all counts to its "inherent authority" as a federal appellate court. (App. 5-6) But while federal courts are undoubtedly vested with certain inherent authority over their proceedings and judgments, that authority may not be invoked to circumvent either federal statutes or federal rules. *Degen v. United States*, 517 U.S. 820, 823 (1996) (inherent powers of courts may be controlled or overridden by statute or rule); *Carlisle v. United States,* 517 U.S. 416, 426 (1996) (scope of "inherent power" does not include power to circumvent federal rules); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (same). The Sixth Circuit's action in this case did both. By inexplicably delaying issuance of the mandate following this Court's denial of certiorari (and rehearing of that denial) and the filing of that order with the circuit court clerk, the Sixth Circuit violated the unambiguous requirement of Fed. R. App. P. 41(d)(2)(D) that the mandate issue "immediately" upon

that event. By considering evidence presented in a "later filing" of a habeas petitioner in order to take new action on previously rejected habeas claims, the Sixth Circuit violated the requirement of 28 U.S.C. §2244(b)(1) that successive habeas applications "shall be dismissed." And by taking the extraordinary act of withdrawing its prior judgment and opinion without a finding, let alone any showing, that such action was necessary to prevent a "miscarriage of justice," the court committed a grave abuse of discretion. The court compounded its initial transgressions by directing that the district court conduct a "full evidentiary hearing" on respondent's habeas claims, without any finding that the conditions prescribed by 28 U.S.C. §2254(e)(2) were met.

Any one of these actions individually would warrant review by this Court because each frustrates the comity between the federal and state courts that Congress and this Court's habeas jurisprudence have sought to preserve. But in combination, the Sixth Circuit's action is nothing short of extreme judicial overreaching, wholly ignoring the jurisdictional limits imposed both by Congress through enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA") and this Court and depriving the State of Tennessee of any assurance of "real finality" necessary to execute the State's judgment in Thompson's or any other capital case. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Intervention by this Court is thus warranted under Sup. Ct. R. 10(a) and (c).

I. THE SIXTH CIRCUIT'S DECISION TO WITHHOLD THE MANDATE FOLLOWING THIS COURT'S DENIAL OF CERTIORARI IS AN EXTRAORDINARY ACT EQUIVALENT TO A RECALL OF THE MANDATE.

The Sixth Circuit's sole stated source of authority for withdrawing its earlier opinion was its "inherent power to reconsider [the] opinion prior to issuance of the mandate." (App. 6) But a federal appellate court may not make an end run around the procedural limitations of AEDPA and the decisions of this Court by delaying issuance of the mandate in violation of the Rules of Appellate Procedure.

Following its initial disposition of Thompson's habeas appeal in January 2003, the Sixth Circuit denied rehearing and a suggestion for rehearing *en banc* on March 10, 2003, but stayed the issuance of the mandate pending a petition for writ of certiorari. (App. 346-47) When the Court denied Thompson's certiorari petition on December 1, 2003, *Thompson v. Bell*, 124 S.Ct. 804 (2003) (No. 03-5759), the Sixth Circuit entered an order extending the stay to allow Thompson to file a petition for rehearing from the denial of the writ of certiorari and "thereafter until the Supreme Court disposes of the case." (App. 348) On January 20, 2004, this Court denied Thompson's petition for rehearing; a copy of this Court's order denying rehearing was filed with the Clerk of the Sixth Circuit on January 23, 2004.

The unequivocal language of Rule 41(d)(2)(D), Federal Rules of Appellate Procedure, makes issuance of the mandate mandatory upon the denial of certiorari: "The court of appeals *must issue the mandate immediately* when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." (emphasis added) There is no

provision under any federal statute or the rules of appellate procedure authorizing a delay in the issuance of the mandate following the denial of certiorari. Rather, the issuance of the mandate upon receipt of an order of this Court denying certiorari is a ministerial act – one in which the actor has a statutory mandate to act in a certain manner without any discretion or power to adopt some other course of action[5] – and, in this case, that act should have occurred *immediately* upon the filing of this Court's order with the circuit court clerk on December 8, 2003. Any further stay of the mandate would have been justified only under the same exceptional circumstances permitting recall of the mandate. The Sixth Circuit, however, extended the stay pending the filing of a petition in this Court for rehearing of the denial of certiorari. Even assuming the court of appeals was justified in entering such an order, the extended stay expired by its own terms when this Court disposed of Thompson's petition for rehearing. (App. 348) For reasons never explained by the court of appeals, however, the mandate was never issued in this case. The Sixth Circuit entered no order further staying issuance of the mandate, let alone justifying a stay. The mandate simply did not issue.

Because Rule 41(d)(2)(D) allows no discretion in the issuance of the mandate, the filing of this Court's order denying certiorari with the Clerk of the Sixth Circuit operated, as a matter of law, to dissolve the Sixth Circuit's March 24, 2003, stay of the mandate. *See also* 16A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3987.1, p. 744 (3d ed. 1999) (If the Supreme

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[5] *Black's Law Dictionary* 899 (5th ed. 1979).

Court denies certiorari, "the stay is automatically dissolved and the rule directs that the court of appeals 'must issue the mandate immediately' when a copy of a Supreme Court order denying the petition for writ of certiorari is filed"). Therefore, a further stay of the mandate or any other action disturbing the finality of the court's prior decision following denial of certiorari is an extraordinary act tantamount to a decision by the court of appeals to recall the mandate. *See, e.g., Adamson v. Lewis*, 955 F.2d 614, 620-21 (9th Cir. 1992) (*en banc*) (continuing stay of mandate following denial of certiorari justified only upon the same exceptional circumstances permitting recall of the mandate); *see also Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) (Rule 41(d)'s express direction makes threshold showing of "exceptional circumstances" necessary before mandate may be stayed after denial of certiorari). And in the federal habeas context, where a prisoner seeks relief from a criminal judgment entered by a state court, this Court has made clear that a decision to recall a mandate must be measured against the statutory and jurisprudential limits applicable in habeas cases. *Calderon*, 523 U.S. at 553. The June 2004 decision of the Sixth Circuit to withdraw its January 2003 opinion came 198 days after Rule 41(d)(2)(D) made issuance of the mandate mandatory and 152 days after the Sixth Circuit's "extension" of the stay expired and should, therefore, be deemed the equivalent of a decision by the Sixth Circuit to recall the mandate. Viewed in that light, the Sixth Circuit's action was patently illegal in several respects.

II. THE SIXTH CIRCUIT'S DECISION TO WITHDRAW ITS PRIOR OPINION AND PERMIT RESPONDENT TO RELITIGATE THE MERITS OF HIS UNDERLYING HABEAS CORPUS PETITION VIOLATES THE PROHIBITION AGAINST SUCCESSIVE APPLICATIONS UNDER 28 U.S.C. §2244(b) AND THIS COURT'S DECISION IN *CALDERON V. THOMPSON*.

A. The Sixth Circuit's decision violates 28 U.S.C. §2244(b).

On March 1, 2001, while his federal habeas appeal was pending in the Sixth Circuit, Thompson filed a post-judgment motion in the district court under Rule 60(b), Federal Rules of Civil Procedure, requesting that the district court permit him to "supplement" the record with the deposition of Dr. Faye Sultan, Ph.D., a psychological expert retained by Thompson in connection with his federal habeas proceeding and, in light of that testimony, "revisit its previous summary denial" of Thompson's habeas petition. (App. 337, 340-41) Although taken pursuant to a discovery order of the district court in federal habeas proceedings and obviously available to Thompson's counsel, the Sultan deposition had not been submitted to the district court during summary judgment proceedings or otherwise made part of the federal court record. In his Rule 60(b) motion, Thompson attributed his failure to submit the deposition in the district court to "mistake, inadvertence, surprise, or excusable neglect" on the part of Thompson's counsel. (App. 340)

Contemporaneous with the filing of his Rule 60(b) motion, Thompson submitted a motion to the Sixth Circuit seeking to hold his appeal in abeyance pending the district court's disposition of the Rule 60(b) motion. (App. 333) Attached to his abeyance motion were, *inter alia*, copies of

the Rule 60(b) motion and the Sultan deposition. The district court denied Thompson's Rule 60(b) motion on March 7, 2001 (App. 343), and the Sixth Circuit denied Thompson's motion to hold his appeal in abeyance on June 22, 2001. (App. 345) Three years later, however, the court of appeals withdrew its initial opinion based upon the very evidence at issue in Thompson's Rule 60(b)/abeyance motions, concluding that, "[b]ecause the evidence here was apparently negligently omitted, because the evidence is so probative of Thompson's mental state at the time of the crime, because there is no surprise to [the Warden] as it was his counsel who took the deposition, and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal. . . ." (App. 5-6) The Sixth Circuit's decision unquestionably was based upon evidence presented in a "later filing" by a habeas petitioner. The court should thus be deemed to have acted on a successive petition subject to the requirements of 28 U.S.C. §2244(b).

Section 2244(b)(1) provides, in relevant part:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

28 U.S.C. §2244(b)(1).

By its terms, §2244 applies only when the court acts pursuant to a prisoner's "application." Thus, whether a case is subject to §2244(b) depends upon the underlying basis of the court's action. When an appellate court recalls its mandate *sua sponte* solely on the basis of a first habeas petition, such action is not subject to the limitations of §2244, but is controlled instead by common law principles

applicable to habeas corpus proceedings generally. *Calderon,* 523 U.S. at 554. Recognizing AEDPA's strict limitations on successive applications, Judge Suhrheinreich expressed the view in his concurring/dissenting opinion that the court was acting "on [its] own motion" and was thus not obliged to satisfy the requirements of §2244. (App. 81) The majority opinion likewise stressed that the court's action was the result of Judge Suhrheinrich's *sua sponte* second review of the record. (App. 2) But where, in recalling a mandate, an appellate court considers new claims or evidence presented in a successive application for relief, the court's action should be regarded as based on that successive application, regardless whether the court characterizes its action as *sua sponte*. *Id*. And, unlike in *Calderon*, the court's incantation that it acted exclusively "on [its] own motion" is disproved by its consideration of matters presented in a "later filing" by Thompson. *Id*.

Indeed, the Sixth Circuit specifically based its decision to recall the mandate on evidence presented in connection with a post-judgment motion filed in the district court and which had come before the Sixth Circuit only by way of a companion abeyance motion filed in that court. The fact that Thompson styled his pleadings as a motion for relief from judgment under Rule 60(b) and/or motion to hold his appeal in abeyance is not controlling. Both filings were made with an eye toward relitigation of a prior claim, *i.e.*, one "that was presented in a prior application," in light of evidence not previously presented to the district court, a result plainly forbidden by §2244(b)(1). Thompson's post-judgment motions were thus the functional equivalent of a successive habeas application, which triggered the limitations of §2244(b)(1). *See Gonzalez v. Sec'y for the Dept of Corr.*, 366 F.3d 1253, 1275 (11th Cir. 2004) (*en banc*) ("If

the recall [of a mandate] is based on a motion by the petitioner, that motion is the functional equivalent of a second or successive petition and the terms of AEDPA's §2244(b) apply regardless of the label put on it"). And because the Sixth Circuit did precisely what *Calderon* says is forbidden – "consideration of [a] matter[] presented in a later filing," 523 U.S. at 544, namely, the Sultan deposition, in order to take new action on previously rejected claims – the court's decision directly contravenes both this Court's prior precedent as well as the letter of §2244(b).

AEDPA has placed the circuit courts in the role of "gatekeeper" to ensure that that no state inmate is permitted to litigate the same claim on the same facts and law in a successive petition in the district court. 28 U.S.C. §2244(b)(1). Congress has made no provision for claims that were presented in a prior petition to be relitigated, regardless of the basis for their reassertion. The Sixth Circuit's actions in this case effectively give Thompson a second bite at the apple as to claims previously rejected by the district court. Because those actions directly contravene AEDPA, certiorari is warranted under Sup. Ct. R. 10(c).

B. The Sixth Circuit's decision violates the rule in *Calderon v. Thompson*.

But even if the Sixth Circuit's decision was not subject to §2244(b), it was still plainly inconsistent with the principles underlying this Court's habeas jurisprudence and directly contravenes this Court's decision in *Calderon v. Thompson*, *supra*. While the courts of appeals are recognized to possess inherent power to recall their mandates, subject to review for an abuse of discretion, the

power can be exercised only in "extraordinary circumstances." *Calderon*, 523 U.S. at 549-50. "The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.*, at 550. A court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief "unless it acts to avoid a miscarriage of justice as defined by [this Court's] habeas corpus jurisprudence." *Id.*, at 558. "'[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence.'" *Id.*, at 559 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). Thus, if the petitioner asserts his actual innocence of the underlying crime, "he must show 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. . . . '" *Id.*, at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). If the petitioner challenges his death sentence, "he must show 'by clear and convincing evidence' that no reasonable juror would have found him eligible for the death penalty in light of the new evidence." *Id.*, at 559-60 (quoting *Sawyer*, 505 U.S. at 348).

Because the Sixth Circuit failed to perceive its action as the equivalent of a recall of the mandate, it made no attempt to justify its decision in a manner appreciative of the extraordinary nature of the act. Indeed, the court implicitly acknowledged that the *Calderon* standard could not be satisfied, explaining its authority instead on the basis of its outstanding mandate – "Although a court of appeals should withdraw an already-issued mandate only to prevent a miscarriage of justice . . . we rely on our inherent power over a case until our mandate issues in reconsidering our opinion in this case." (App. 6) But since the court's rationale cannot survive the clear language of

Rule 41(d)(2)(D), Federal Rules of Appellate Procedure, *see* Argument I, the court's sole basis for its authority to act is eliminated.

When viewed under the appropriate standard, the evidence presented in this case does not approach the "strong showing of actual innocence" necessary to satisfy the "miscarriage of justice" exception. *Calderon*, 523 U.S. at 557. Indeed, neither the initial nor subsequent opinion of the court of appeals contains any suggestion that Thompson did not kill Brenda Lane or that he is otherwise "innocent" of her murder, a result that is hardly surprising, since Thompson himself confessed to the crime. *Thompson*, 768 S.W.2d at 243. It was Thompson's own statement that led authorities to Brenda Lane's body, *id.*, and as recently as January 19, 2004, Thompson accepted full responsibility for her murder, as noted in the Tennessee Supreme Court's May 2004 opinion. *Thompson*, 134 S.W.3d at 181. (App. 374-75) Rather, the Sixth Circuit concluded that the Sultan deposition, which had not been presented to the district court, would have been probative in analyzing the prejudice prong of Thompson's claim of ineffective assistance of counsel at sentencing, since it could have demonstrated available mitigating evidence related to his mental state at the time of the crime. (App. 2-3, 84-89) The court's analysis falls far short of the demanding standard required to take the extraordinary act of recalling the court's mandate "[i]n light of the 'profound interest in repose' attaching to the mandate of a court of appeals." *Calderon*, 523 U.S. at 549-50 (quoting 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3938, p. 712 (2d ed. 1996)).

After the courts of the State of Tennessee affirmed Thompson's conviction and sentence on direct appeal and

then refused to disturb it on state collateral review, the State ran the gauntlet of habeas corpus review in the federal district court and the court of appeals. Relying on the finality of the Sixth Circuit's January 2003 decision denying federal habeas relief, the courts of Tennessee thereupon took the steps necessary to enforce Thompson's death sentence. In the period between this Court's final disposition of Thompson's request for certiorari in January 2004 and the Sixth Circuit's second decision in June 2004, the Tennessee Supreme Court set a new execution date, ordered expedited competency proceedings in the trial court, disposed of numerous procedural motions seeking to delay execution of the judgment, and issued a detailed opinion following expedited appeal proceedings affirming the trial court's denial of Thompson's claim of incompetence for execution. In short, the State marshalled the full force of its judicial machinery in what should have been the final step toward execution of its judgment. This case, like *Çalderon*, illustrates the extraordinary costs associated with a federal court of appeals' recall of its mandate denying federal habeas relief.

When a court of appeals recalls a mandate to revisit the merits of its earlier decision denying habeas relief, "the State's interests in finality are all but paramount, without regard to whether the court of appeals predicates the recall on a procedural misunderstanding or some other irregularity occurring prior to its decision." *Calderon*, 523 U.S. at 557. Because Thompson has already had extensive review of his claims in both state and federal courts, absent a strong showing of actual innocence, "the State's interests in finality outweigh the prisoner's interest in obtaining yet another opportunity for review." *Id.* The

Sixth Circuit's surprise reconsideration of its January 2003 decision frustrates the State's "all but paramount" interest in finality and constitutes a grave abuse of discretion. Certiorari is warranted under Sup. Ct. R. 10(a) and (c).

III. BY REMANDING THE CASE FOR A "FULL EVIDENTIARY HEARING" ON RESPONDENT'S INITIAL HABEAS CORPUS PETITION WITHOUT ANY FINDING THAT THE CONDITIONS PRESCRIBED BY 28 U.S.C. §2254(e)(2) WERE MET, THE SIXTH CIRCUIT'S DECISION IS CONTRARY TO AEDPA'S PROHIBITION ON THE GRANT OF EVIDENTIARY HEARINGS IN FEDERAL HABEAS PROCEEDINGS AND CONFLICTS WITH THIS COURT'S DECISION IN *WILLIAMS V. TAYLOR*.

Even if the Sixth Circuit had authority to "reconsider" its decision six months after the judgment became final, the court's directive that the district court conduct a "full evidentiary hearing" on the basis of evidentiary material never presented to the Tennessee state courts exceeded its statutory authority under 28 U.S.C. §2254(e)(2). After invoking its "equitable power to supplement the record on appeal" with a deposition that had not previously been presented to either the state courts or (prior to its summary dismissal of Thompson's habeas petition) the federal district court, the Sixth Circuit vacated the district court's grant of summary judgment and remanded the case "for a full evidentiary hearing." (App. 5-6) The court did so, however, without any apparent recognition of, let alone an independent inquiry into, §2254(e)(2)'s limitations on such proceedings.

A motion for summary judgment may only be defeated by disputes over facts that may ultimately affect the

outcome of the proceedings. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 (1986) (materiality determination for summary judgment purposes rests on governing substantive law). And in the habeas corpus context, a federal court may only assess a state court's decision in light of additional facts outside the state-court record if the habeas petitioner was not at fault in failing to develop that evidence in state court, or, if he was at fault, when the conditions of §2254(e)(2) are met. *See, e.g., Holland v. Jackson*, 124 S.Ct. 2736, 2738 (2004) (federal court erred in finding state court's determination of habeas petitioner's ineffective assistance claim to be unreasonable application of *Strickland* based on evidence outside state-court record absent finding that §2254(e)(2)'s conditions were satisfied). The determination whether the Sultan deposition was sufficient to defeat the warden's motion for summary judgment was, therefore, inextricably tied to Thompson's entitlement to an evidentiary hearing under 28 U.S.C. §2254(e)(2). In *Williams v. Taylor*, 529 U.S. 420 (2000), this Court outlined the proper analysis to be performed when a habeas petitioner seeks an evidentiary hearing on claims that have not been developed in state court. A federal court presented with such a request must first ascertain whether the "applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. §2254(e)(2). If the petitioner did not "fail to develop" the claim in state court, the statute will not bar an evidentiary hearing. If, on the other hand, a prisoner has not been diligent in presenting his or her claims in state court, AEDPA prohibits an evidentiary hearing except where §2254(e)(2)(A) and (B) are satisfied. *Id.*, 529 U.S. at 431-37. The Sixth Circuit conducted neither inquiry before remanding Thompson's case to the district court.

In addition, adding to the confusion created by its already erroneous ruling, the court failed to specify which

of Thompson's 26 claims for habeas corpus relief, or even which of the 22 bases for his claim of ineffective assistance of counsel, were encompassed within its mandate of a "full evidentiary hearing." *Compare Williams*, 529 U.S. at 437-44 (performing §2254(e)(2) analysis as to each claim for relief). *See also* 28 U.S.C. §2254(e)(2) ("If the applicant has failed to develop the factual basis *of a claim* in State court proceedings, the court shall not hold an evidentiary hearing *on the claim* unless the applicant" meets the requirements of sub-parts (A) and (B) (emphasis added)). Under the guise of its "equitable" and "inherent" powers, the Sixth Circuit's ruling flouts the clear language of §2254(e)(2) and this Court's decisions. Certiorari is warranted under Sup. Ct. R. 10(a) and (c).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GREGORY THOMPSON,
Petitioner-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellee.

No. 00-5516

Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga.
No. 98-00006 – R. Allan Edgar, Chief District Judge.

Decided and Filed: June 23, 2004

Before: SUHRHEINRICH, MOORE,
and CLAY, Circuit Judges.

COUNSEL

ARGUED: Dana C. Hansen Chavis, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Dana C. Hansen Chavis, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

MOORE, J., delivered the opinion of the court, in which CLAY, J., joined. SUHRHEINRICH, J. (pp. 7-105), delivered a separate opinion concurring in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. Eighteen months ago, this panel in a split decision producing three different opinions affirmed the decision of the district court granting summary judgment to respondent in this habeas corpus action. Judge Suhrheinrich later conducted sua sponte a second, thorough review of the record and came to the conclusion that the facts as adduced in deposition testimony not part of the district court record supported the granting of the writ. *See infra* (Suhrheinrich, J., concurring). Upon reviewing the deposition of Dr. Faye Sultan, and investigating the procedural complications of this case, it is clear that this extremely probative testimony requires that we vacate the district court's grant of summary judgment in favor of respondent.

Judge Suhrheinrich summarizes most effectively the Sultan deposition and its value in assessing Gregory Thompson's mental state at the time of the crime. Where his opinion goes too far is in its accusations of fraud on the court; while his explanation for the omission of the Sultan deposition from the official record before the court is possible in the narrowest sense, the power of this court should not be used to make such accusations without more definite proof than the factual record of this case reveals.

Dr. Sultan's deposition was taken by trial counsel for respondent, but was not included with the evidence submitted as part of Bell's motion for summary judgment. Slightly more than one year later, contemporaneous with the preparation of this appeal, appellate habeas counsel

made a Rule 60(b) motion in the district court asking to include the Sultan deposition as part of the record. At the same time, Thompson's counsel submitted that deposition to this court as part of his motion to hold this appeal in abeyance during the pendency of the Rule 60(b) motion. Applying the principle of Occam's razor, we conclude that more than likely, a genuine mistake was made, one which was not realized until a different attorney looked at the case. To conclude otherwise is to disbelieve sworn testimony by an officer of the court, and to assume that habeas counsel conspired to conceal evidence beneficial to their client, for no discernible reason – evidence loses power, rather than gains it, by being revealed on the "eve of execution" in a second habeas petition Reading Judge Suhrheinrich's opinion, one might conclude that this court had only recently unearthed the Sultan deposition, when in fact it was submitted to the panel prior to oral argument as part of the abeyance motion.

We did not consider it, however, in rendering our decision, believing ourselves to be bound by the record created in the district court. Upon reflection, and after reviewing Judge Suhrheinrich's forceful assessment of the probity of the Sultan deposition, we believe it is appropriate to use our inherent equitable powers to expand the record on appeal to consider the deposition. Ordinarily, a court of appeals should only consider evidence made part of the district court record. Where through error or accident material matters are omitted or misstated, Federal Rule of Appellate Procedure 10(e) allows correction of the appellate record to include the corrected material. *See Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1012 (6th Cir. 2003). While some circuit courts have held that Rule 10(e) allows the inclusion of material the

district court did not consider, *see In re Capital Cities/ ABC, Inc.'s Appl. for Access to Sealed Trs.*, 913 F.2d 89, 97 (3d Cir. 1990) (citing inconsistent circuit precedent); *United States v. Aulet*, 618 F.2d 182, 187 (2d Cir. 1980), the rule in this circuit has consistently been that Rule 10(e) does not allow such inclusion. *See, e.g., Inland Bulk*, 332 F.3d at 1012; *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 641 (6th Cir. 1982). We adhere to our previous interpretation that Rule 10(e) does not allow inclusion in the appellate record of material that the district court did not consider.

Although Rule 10(e) is thus unavailable, we recognize that a number of our sister circuits have held that the courts of appeals have the inherent equitable power to supplement the record on appeal, where the interests of justice require. *See United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000) ("[U]nder some circumstances, we have an inherent equitable power to supplement the record on appeal. However, we conclude the present case" does not present those circumstances.); *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986) (relying on *Dickerson, infra*, and exploring circumstances under which exercise of that power is appropriate); *Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984) ("Although a court of appeals will not ordinarily enlarge the record to include material not before the district court, it is clear that the authority to do so exists."); *Dickerson v. Alabama*, 667 F.2d 1364, 1368 (11th Cir. 1982) (relying on court's inherent equitable powers to supplement the record in habeas case); *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970) ("[I]n the interest of justice, this court may order the record enlarged."); *Gatewood v. United States*, 209 F.2d 789, 792-93 & n.5 (D.C. Cir. 1953) (sua sponte ordering preparation

of transcript for record "in the interest of both parties, and of the due administration of justice"); *see also* 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3956.4, at 349-51 (3d ed. 1999 & Supp. 2003) ("In special circumstances, however, a court of appeals may permit supplementation of the record to add material not presented to the district court."); 20 *Moore's Federal Practice*, § 310.10[5][f], at 310-19 (3d ed. 2000) ("In extraordinary situations, the circuit court may consider material not presented to the district court when it believes the interests of justice are at stake."). Although recent Sixth Circuit cases indicate that we have not yet "embraced the notion that the record can be supplemented under an appellate court's equitable authority," *see Inland Bulk*, 332 F.3d at 1012, in at least one earlier state habeas case we have so supplemented the record, citing to *Dickerson*, 667 F.2d at 1367. *See Prather v. Rees*, 822 F.2d 1418, 1420 n.1 (6th Cir. 1987) ("Although the parties did not provide the court with copies of the state court briefs, this court may supplement the record when necessary."); *see also Adams v. Holland*, 330 F.3d 398, 405-06 (6th Cir. 2003) (recognizing exception to Rule 10(e) in habeas cases: "where substantial portions of [the state trial transcript] were omitted before the District Court, a habeas case should be remanded to the District Court for consideration in light of the full record."). Because the evidence here was apparently negligently omitted, because the evidence is so probative of Thompson's mental state at the time of the crime, because there is no surprise to respondent as it was his counsel who took the deposition, and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal, despite the omission of the deposition from the District

Court record. We therefore vacate the grant of summary judgment, and remand the case to the District Court for a full evidentiary hearing.

It remains to be explained the source of our power to so reconsider our earlier opinion, as we do not join in Judge Suhrheinrich's allegation of fraud on the court. Instead, we rely on our inherent power to reconsider our opinion prior to the issuance of the mandate, which has not yet issued in this case. Although a court of appeals should withdraw an already-issued mandate only to prevent a miscarriage of justice, *see Calderon v. Thompson,* 523 U.S. 538 (1998), at least two of our sister circuits have reconsidered opinions where the mandate has not yet issued. *See Wilson v. Ozmint,* 357 F.3d 461, 464 (4th Cir. 2004) ("The mandate of the court has not yet issued in this case, and, therefore, we may, at our discretion, 'amend what we previously decided. . . .'") (quoting *Alphin v. Henson,* 552 F.2d 1033, 1035 (4th Cir. 1980)); *First Gib. Bank v. Morales,* 42 F.3d 895, 898 (5th Cir. 1995) (relying on *Alphin,* 552 F.2d at 1035, to reconsider decision where mandate had not yet issued). We therefore rely on our inherent power over a case until our mandate issues in reconsidering our opinion in this case.

The judgment of the district court is therefore **VACATED**, and the case is **REMANDED** for further proceedings not inconsistent with this opinion. Thompson's execution is also **STAYED** for 180 days to permit the district court to proceed.

CONCURRING IN PART, DISSENTING IN PART

SUHRHEINRICH, Circuit Judge, concurring in part and dissenting in part.

I. Introduction

Petitioner-Appellant Gregory Thompson ("Thompson" or "Petitioner") was convicted of first degree murder and sentenced to death by the State of Tennessee. In a previous decision, this Court affirmed the district court's denial of his request for a writ of habeas corpus. *See Thompson v. Bell,* 315 F.3d 566 (6th Cir. 2003), *cert. denied,* 124 S. Ct. 804 (2003). The Supreme Court denied Thompson's petition for writ of certiorari. On February 25, 2004, the State of Tennessee granted the State's motion to set an execution date and has ordered that the Warden of the Riverbend Maximum Security Institution or his designee execute the sentence of death on August 19, 2004, "unless otherwise ordered by this Court or other appropriate authority." This matter is now before this Court on its own motion.

Essential to our conclusion that Thompson was not denied effective assistance of counsel due to counsel's failure to introduce evidence that he suffered from schizophrenia at the time of the offense was our finding that Thompson "has never submitted *to any court* any proof that he suffered from severe mental illness at the time of the crime." *Thompson,* 315 F.3d at 590. Subsequent to the issuance of our decision on January 9, 2003, information has come to the attention of the Court which requires us to

determine whether our decision to affirm the district court's denial of Thompson's petition for writ of habeas corpus relief from his death sentence was improvident.

While reviewing various Sixth Circuit death penalty cases in preparation of a law review article on the subject, an intern in my chambers, who also happens to be a board-certified psychiatrist, expressed concern as to why Thompson's post-conviction expert, Gillian Blair, Ph.D., and Thompson's habeas experts, Barry Crown, Ph.D. and Faye Sultan, Ph.D., had not directly addressed the question as to whether Thompson did or did not exhibit symptoms of a major mental illness at the time of the crime or sentencing, and, if he did, whether the symptoms were sufficient at that point to support a diagnosis of mental illness which should have been presented as mitigating evidence at the sentencing hearing. I then conducted my own review of the entire certified record, in addition to my prior review of the joint appendix. As a result of my review of the entire certified record, I feel that it is incumbent upon me, as a judicial officer sworn to uphold the Constitution, and as authoring judge of the initial opinion, to reverse that ruling and issue this opinion. Although I am now merely a concurring/dissenting judge in this matter, I wish it to be known that the initiative for this decision came from my chambers. The majority's ruling is based upon their review of my draft opinion, prepared after my discovery, and the hundreds of hours of work that followed, reviewing the entire record, researching the law, and drafting this opinion.

The question thus is whether our prior ruling was mistaken, because there is, and was, in fact available proof that Thompson was suffering from a serious mental disease or defect at the time of the 1985 offense which

would have substantially impaired his ability to conform his conduct to the requirements of law.[1] Also at issue, and integral to the primary question, is whether the federal habeas counsel in this case committed fraud on the court by intentionally or recklessly failing to present critical evidence on the question, of which they had knowledge, to the district court. For the reasons that follow, we vacate our prior ruling and conditionally grant the writ.

II. Background

The facts are set forth in great detail in our prior opinion. *See id.* However, because the present inquiry involves voluminous facts and procedural history not presented to us on appeal as part of the joint appendix, it is necessary to revisit much of the case, and to review and present the new materials. To the extent possible, I have attempted to present the relevant facts in chronological and procedural order.

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[1] The Tennessee Code Annotated, § 39-13-204(j) lists as a mitigating factor:

> (8) The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of a mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affect the defendant's judgment[.]

Tenn. Code Ann. § 39-13-304(j)(8) (2003).

A. State Court Proceedings

1. Trial Court

Brenda Lane was murdered on January 1, 1985. Thompson was apprehended the next day. On January 29, 1985, the trial court appointed counsel. On February 26, 1985, less than two months after the murder, counsel filed a notice of insanity defense and also requested a mental or psychological evaluation of Thompson to determine (1) whether Thompson was competent to stand trial, and (2) his mental capacity at the time of the crime. On March 25, 1985, less than three months after the murder, trial counsel filed a supplementary motion for a psychiatric examination and a neurological examination to determine (1) whether Thompson was competent to stand trial and assist counsel with his defense, (2) whether Thompson was suffering from a mental illness on the date of the offense, and (3) whether Thompson was in need of hospitalization for further psychiatric treatment and evaluation. The affidavit in support stated that Thompson had previously suffered two concussions, one when he was sixteen years old from a car accident, and the second while in the Navy, when he was beaten in the head with a hammer by three fellow servicemen.

On March 28, 1985, less than three months from the date of the offense, the trial court ordered that Thompson be referred to the Multi-County Mental Health Center for a forensic evaluation to determine (1) his competency to stand trial and to assist in his own defense, and (2) his mental capacity at the time of the crime. On April 4, 1985, the trial court entered another order directing Thompson to undergo a forensic evaluation at a state facility, Middle Tennessee Mental Health Institute ("MTMHI"), for a maximum of thirty days. A team of forensic psychologists

at MTMHI evaluated Thompson and found him to be competent.

Trial counsel questioned the state team's impartiality and requested funds to secure further psychiatric evaluations. On July 29, 1985, the trial court granted counsel funds to hire an independent psychiatrist. Instead, counsel used the funds to hire Dr. Copple, a clinical psychologist. Trial counsel stated that the effort to hire a psychiatrist "was not successful." *Id.* at 573. Also as part of their trial preparation, counsel traveled to Thompson's home town where they interviewed various family members and acquaintances of Thompson.

Thompson did not present a defense at trial, and the jury convicted him of the first degree murder of Brenda Lane. At the sentencing phase, Thompson's former girlfriend, Arlene Cajulao, testified that she knew Thompson from 1980 until June 1984. She described Thompson as caring and sensitive. On cross-examination, she testified to incidents concerning Thompson's violent behavior while in the Navy. Thompson's sister, Nora Jean Walton, testified about his activities in Georgia upon his return from Hawaii after his discharge from the Navy. Dr. Copple also testified. He stated that he spent roughly eight hours examining Thompson over several sessions. Copple stated that during the first session, he was basically looking at what things Thompson would be capable of doing in a prison setting. Copple testified that, in his opinion, Thompson had an unusually strong need to nurture other people that had impelled him to some unwise actions. Copple felt that Thompson did not have an adult antisocial personality disorder. On cross-examination Copple stated that he did not think Thompson was suffering from any mental illness.

The State presented in rebuttal the deposition testimony of Dr. Robert Glenn Watson, who had participated in the staff evaluation of Thompson at MTMHI. Watson found no intellectual impairment. Watson also testified that they found no real evidence of organicity or brain damage. Watson also administered the Minnesota Multiphasic Inventory-II ("MMPI"), but determined that the tests results reflected malingering. Watson further stated that on May 24, 1985, at a staff conference, based on all the data, the staff concluded that:

> [Thompson] exhibited none of the signs of an affective illness. His judgment and insight are rather poor. Psychological testing revealed him to be functioning in the average range intellectually, to exhibit no signs of organicity or brain damage on the Bender-Gestalt Test and the Bender Interference Procedure. Personality profiles revealed no evidence of a psychosis, but indicated malingering in the mental illness direction. (For example, the schizophrenic score was at T 120, while clinical observations revealed no evidence of a thought disorder.)

The staff at MTMHI diagnosed Thompson as Axis 1, Adult Antisocial Behavior, 071.01. The forensic team therefore concluded that Thompson was mentally competent to stand trial and was not suffering from a mental disease or defect.

The jury imposed the death penalty at the conclusion of the penalty phase, and the trial court entered judgment sentencing Thompson to death by electrocution. Thompson thereafter pursued his direct appeals to no avail.

2. Post-Conviction

On October 16, 1990, Thompson filed a petition for post-conviction relief, claiming in relevant part that trial counsel failed to investigate adequately Thompson's background and personal and medical history for the existence of mitigating evidence. *See Thompson,* 315 F.3d at 576. On February 1, 1991, post-conviction counsel filed an *ex parte,* sealed motion seeking "funds to hire a licensed psychologist or psychiatrist and an investigator to assist in the preparation of his case for post-conviction relief." *Id.* at 577. In support, counsel attached the affidavit of Dr. Gillian Blair, a clinical psychologist. Blair noted that Thompson's post-incarceration medical records indicated that Thompson had been variously diagnosed as having bipolar affective disorder, schizo-affective disorder, and schizophrenia, paranoid type, and was taking Lithium, Haldol, and Cogentin. *Id.* Blair opined that "[i]f Mr. Thompson is found to be suffering from neurological or psychological impairment as described above, it is likely that some degree of such impairment would have existed at the time of the offense and would have been a significant factor in determining whether or not Mr. Thompson was able to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law when he committed the homicide of which he stands convicted." *Id.* Blair indicated that Thompson needed a full psychological evaluation. *Id.*

The state trial post-conviction court held an evidentiary hearing on March 27 and March 29, 1995. At the hearing Blair testified that she reviewed Thompson's institutional records, beginning with the 1985 MTMHI assessment. She also interviewed Thompson in March and April 1992, and at that time administered "a basic

psychological battery of tests with some additional ... neuropsychological tests because of the history of head injuries that Mr. Thompson had received and that were well documented in his medical record." *Id.* at 578-79. Blair then articulated the following opinion:

> The Riverbend medical record indicated that since 1985, Mr. Thompson had shown a deteriorating mental status. He had become psychotic. He had been treated with anti-psychotic medication at that time. He was treated with Haldol, Cogentin, and Lithium, and three different treating physicians at that time: Dr. Dyner [sic], Dr. Deal, and Dr. Humble had all over the years from 1985 to 1990 had diagnosed him as either having bipolar disorder or a schizo affective disorder or schizophrenia. They described his agitated behavior. They described his hostility. They described his inappropriate affect, his experience of auditory hallucinations, his delusions, his paranoia, his thoughts of persecution. He had attempted suicide of [sic] a couple of occasions. He had set fire to his cell burning both his hands and his face. They had certainly – two of those psychiatrists and maybe all three of them had considered the possibility that he was malingering, that he was faking mental illness and throughout their Riverbend records, it was clear that those psychiatrists had discounted the possibility of malingering because they didn't feel that it accounted for all of the psychotic symptoms they saw in him.

Id. at 579.

Blair was also asked what other facts would be necessary for her to develop an opinion as to Thompson's condition at the time of the offense. She stated that "the most

important thing that would be necessary would be a full history and full medical records of Mr. Thompson prior to the commission of the offense." *Id.* She added that:

> From the records I was able to review, it was clear that the social history was very sketchy in terms of his remote history, his childhood and his upbringing, and also family history of mental illness. There seemed to be a [sic] strong evidence to suggest that there was mental illness in his family, probably in his father who committed suicide and was known to be extremely violent and possibly in his mother but none of those records were available.

Id. Blair therefore stated that she did not have an opinion about Thompson's diagnostic status in 1985. *Id.*

On cross-examination, Blair stated that she had reviewed all of the records included in the files from MTMHI. This included daily progress notes, medication sheets, the report of psychological testing, the discharge summary, the admission summary, the staff conference report, and the social worker's history. *Id.* When asked whether she thought MTMHI's testing procedure was unreliable, she averred that it was not unreliable, but simply "not extensive enough." *Id.* Blair further testified that from her own testing,[2] she did not believe that Thompson was faking or attempting to fake mental illness.

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[2] Blair stated that she administered the following tests:

> The tests that I administered in 1992 that directly addressed whether there was psychosis or not, I administered the PAI, I administered the MMPI II which replaces the MMPI which was administered in 1985. I administered the Rorschach, which was not administered in 1985. The PAI

(Continued on following page)

On May 15, 1995, the post-conviction court denied Thompson's claims. The court found that defense counsel had made an adequate investigation into their client's background and prior medical history. The court stated that state post-conviction counsel had presented no proof of mental problems that would have provided Thompson with a defense or shielded him from the death penalty. *Id.* at 580. The Tennessee Criminal Court of Appeals held that Thompson had failed to establish that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Id.* That court specifically noted that "Dr. Blair declined to give an opinion on these important issues, and the evidence does not preponderate against the trial court's finding that the defense attorneys were not ineffective." *Id.* (quoting *Thompson v. State,* 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997)).

b. Federal Habeas Proceedings

1. District Court

On January 23, 1998, Thompson filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (DCTR 1).[3] He also filed a motion and application for appointment of counsel to investigate, prepare and file the petition, pursuant to 21 U.S.C. § 848(q)(4)(B). (DCTR 2).

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was not administered in 1985. I administered the MCMI II and I administered the Rorschach, which is a projective test of personality which was not – the others are all objective. They are all tests in which individual answers true or false and the Rorschach is very different.

Id. at 579-80.

[3] District Court Record ("DCTR").

On January 29, 1998, the court granted Thompson's motion for appointment of counsel and designated the Federal Defender Services of Eastern Tennessee, Inc., to provide Thompson with an attorney to prepare and file a petition for a writ of habeas corpus and "to prepare for and participate in all proceedings in connection therewith." (DCTR 3).

On March 9, 1998, the district court held a scheduling conference. Attorney Stephen M. Kissinger was present representing Thompson. Assistant Tennessee Attorney General John H. Baker III was present on behalf of the State. (DCTR 6). On March 11, 1998, the district court entered a scheduling order. The court required, in relevant part, that disclosure of anticipated use of any expert witness and disclosure of information regarding the expert and the expert's expected testimony was to be completed by Thompson by October 30, 1998. The court directed the Warden to disclose his expert witnesses by December 31, 1998. The scheduling order also provided that the Warden's answer to the petition for writ of habeas corpus was to be filed on or before July 17, 1998, and that the parties file a joint schedule of needed discovery by July 24, 1998.

On May 26, 1998, Assistant Attorney General Glenn R. Pruden became counsel of record for the Warden.

a. The Petition

As required by the scheduling order, Thompson filed his petition for writ of habeas corpus on June 12, 1998. Thompson alleged in relevant part that his trial counsel were ineffective for failing to: (1) perform a reasonable investigation of his background and mental health history; (2) secure adequate expert assistance regarding his mental

health; (3) discover available evidence of mental illness caused by two serious head injuries; and (4) investigate and challenge Thompson's competency to stand trial as well as his competency at the time of the offense.[4] He also

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[4] In fact, the allegation, as stated in his traverse, reads as follows:

The petition alleges in relevant part that:

> In violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, petitioner was denied the effective assistance of counsel at the guilt phase of trial, the sentencing phase of trial, on appeal, and in post-conviction proceedings. In particular, counsel failed to perform reasonably, and there is a reasonable probability, sufficient to undermine confidence in the outcome of trial, sentencing, appeal, and post-conviction proceedings, that had counsel performed reasonably, petitioner would not have been convicted or sentenced to death, and/or would have received relief on appeal or in post-conviction proceedings. Specifically, counsel was ineffective for the following non-exclusive list of reasons:
>
> a. Counsel at all critical stages failed to reasonably investigate Mr. Thompson's background and mental health history. Had counsel done so, they would have discovered that Petitioner had, in the years following his graduation from high school, intermittently demonstrated bizarre and delusional thought patterns, particularly during objectively stressful situations. They would have also discovered that members of Petitioner's family, e.g., his father, had a long and pervasive history of severe mental illness. There is a reasonable probability that such evidence, when coupled with evidence presented during trial, would have convinced one or more jurors that Mr. Thompson's confession was not the truth, but rather the product of the interaction between his mental illness, his desire to protect his co-defendant, Joanne McNamara, and illegal questioning by police, as well as to provide relevant mitigating evidence at the sentencing phase of trial. Trial counsel, however, failed to perform a reasonable investigation, failed to find such evidence, and consequently failed to present the following evidence

(Continued on following page)

> to the jury, both during the guilt phase and during the sentencing phase of the trial.
>
> b. Counsel was ineffective for failing to fully investigate and present relevant evidence of Mr. Thompson's mental health history, and to secure adequate expert assistance to defend Mr. Thompson including psychologists, neuropsychological, and/or neurological experts to establish valid mitigating factors including, but not limited to, three statutory mitigating factors under Tennessee law, i.e, that Mr. Thompson suffered from substantial mental disorders and demonstrable physical brain damage which made him unable to conform his behavior to the law; left him under the influence of extreme mental or emotional disturbance, substantially impaired his ability to appreciate the wrongfulness of his conduct at the time of the offense, *and* non-statutory mitigation under both Tennessee and federal law. As importantly, had counsel secured such mental health history, the result of any professionally adequate pre-trial competency and insanity examination (including, if indeed it was, or had been, professionally adequate, the pre-trial competency examination actually performed in Mr. Thompson's case) would have been different. Specifically, but not exclusively:
>
> i. Counsel failed to discover and interview pertinent, available witnesses who could have testified and or informed appropriate mental health experts of Mr. Thompson's descent into intermittent bizarre and delusional behavior following high school;
>
> ii. Counsel failed to discover available evidence of mental illness caused by two serious head injuries.
>
> iii. Counsel failed to obtain medical and other important records for the purpose of presenting evidence in mitigation.
>
> c. Counsel failed to obtain adequate expert assistance, including confidential psychological, neuropsychological, and neurological experts.

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claimed that he was denied funding for mental health and investigative experts during the state trial and post-conviction proceedings. The petition was signed by Stephen M. Kissinger.

On August 25, 1998, the district court entered an order granting Respondent's motion for extension of time for filing a discovery schedule, moving the deadline to September 2, 1998.

On October 22, 1998, Thompson filed an amended petition for writ of habeas corpus. Thompson contended, in pertinent part, that the state courts denied him funding for mental health and investigative experts at trial and during state post-conviction proceedings, implicating his fundamental rights to due process, equal protection, and effective assistance of counsel. (DCTR 17). Thompson also complained that he was denied expert funding, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. He alleged in relevant part:

a. Both trial and post-conviction counsel knew Petitioner's mental state was an important issue but without assistance from a competent investigator and mental health expert, counsel was unable to explain and overcome the state mental hospital's initial findings.

b. Attorney Parsons was aware of Petitioner's history of head injuries and "the significant [sic] of those head injuries and what that can do to somebody." P.C. Vol. I, p. 38. Later,

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d. Counsel failed to investigate and challenge Petitioner's competency to stand trial as well as his competency at the time of the offense.

counsel also witnessed "a period when he [Petitioner] got sick mentally." P.C. Vol. I, p. 83. Trial counsel requested funds for a mental health expert but were denied. Instead, Petitioner was sent to Middle Tennessee Mental Health Institute (MTMHI) for a competency evaluation. Although MTMHI found Petitioner to be competent, Mr. Parsons continued to believe further evaluation was needed. . . .

c. Records from Riverbend Maximum Security Institution reflect that several different treating psychiatrists have diagnosed Petitioner as having either a bipolar affective disorder, cyclic mood disorder, schizo-affective disorder or schizophrenia. All of the psychiatrists described Petitioner's agitated behavior, hostility, inappropriate affect, auditory and visual hallucinations, delusions, paranoia, and thoughts of persecution. Psychiatrists considered the possibility of Petitioner's malingering and all discounted that possibility. State examiners at Riverbend ruled out malingering noting that it did not explain all psychotic features. Test results indicating schizophrenia were found consistent with Petitioner's psychotic disorder even at his then current "stable" level of functioning. Since his incarceration, Petitioner has been heavily medicated. For example, Petitioner has taken Lithium and Klonopin, both indicated for bipolar disorder; Depakene and Depakote indicated for epileptic conditions and rapid cycling bipolar disorder due to brain disease; the anti-psychotic drugs Haldol, Haloperidol, Mellaril, Navane, Thioridazine, and Trilafon; Cogentin/Benztropine

to minimize the effect of such drugs; the sedative Vistaril; and, Ativan/Lorazepam and Valium to reduce agitation.

d. Post-conviction counsel repeatedly requested funds for a mental health expert. The prosecutor argued that post-conviction counsel were not entitled to experts at state expense. P.C. Vol. 1, p. 16. In support of the motion for funding, counsel submitted the affidavit of Dr. Gillian Blair. Dr. Blair's affidavit and post-conviction testimony reflected her need for a complete social history, additional testing and interviews before she could render an opinion on Petitioner's mental status at the time of the crime, at trial, and at the present time. *See generally* P.C. Vol. I, pp. 199-219. Dr. Blair opined that based on the Riverbend records, her test results from 1992, and the brief social history available, further investigation and examination of Petitioner was required. Dr. Blair testified that since 1985 Petitioner had shown a deteriorating mental status. P.C. Vol. II, p. 209. Petitioner had been diagnosed with bipolar disorder, schizo affective disorder or schizophrenia. *Id.* She further testified that schizophrenia and bipolar disorder, indeed all forms of psychosis, generally begin in early adulthood, *Id.* at 215, which coincides with the timing of the instant offense. Dr. Blair stated that Petitioner's troubles in the Navy, just prior to the crime, would suggest that he was becoming mentally ill at that time. *Id.* at 216. However, further information was needed to render an opinion and diagnosis of Petitioner at that time. Dr. Blair also stated that further

evaluation of Petitioner was necessary to determine his present competency. *Id.* at 207.

e. The court denied funding for expert assistance at the post-conviction hearing. The court reasoned that funds were unnecessary because Petitioner had not shown a "need," further funding would result in a delay of the proceedings and the issue was a matter of record. . . .

f. Although the court found no "need" for further expert assistance, the court later used the fact that Dr. Blair could not express an opinion as to the issues of Petitioner's mental health to limit Dr. Blair's testimony and, subsequently, to deny Petitioner relief from his unconstitutional conviction and sentence. For example, throughout Dr. Blair's testimony, the prosecutor made repeated objections on the basis that Dr. Blair did not have an ultimate opinion. *See e.g.* P.C. Vol. II, pp. 208, 215, 216, 220, 259. Although the court allowed most of Dr. Blair's answers, it did so remarking that the weight of the testimony was specious. *See id.* The court, however, did not allow Dr. Blair to testify about mitigating circumstances.

(Footnotes omitted.).

Thompson further alleged ineffective assistance of counsel, for the following non-exclusive reasons:

1. Counsel at all critical stages failed to reasonably investigate Mr. Thompson's background and mental health history. Had counsel done so, they would have discovered that Petitioner had, in the years following his

graduation from high school, intermittently demonstrated bizarre and delusional thought patterns. They would have also discovered that members of Petitioner's family, e.g., his father, had a long pervasive history of severe mental illness. Trial counsel, however, failed to perform a reasonable investigation, failed to find such evidence, and consequently failed to present the following evidence to the jury, both during the guilt phase and during the sentencing phase of the trial.

2. Counsel was ineffective for failing to fully investigate and present relevant evidence of Mr. Thompson's mental health history, and to secure adequate expert assistance to defend Mr. Thompson including psychologists, neuropsychological, and/or neurological experts to establish valid mitigating factors including, but not limited to, three statutory mitigation factors under Tennessee law, i.e., that Mr. Thompson suffered from substantial disorders and demonstrable physical brain damage which made him unable to conform his behavior to the law; left him under the influence of extreme mental or emotional disturbance, substantially impaired his ability to appreciate the wrongfulness of his conduct at the time of the offense, *and* non-statutory mitigation under both Tennessee and federal law. As importantly, had counsel secured such mental health history, the result of any professionally adequate pre-trial competency and insanity examination (including, if indeed it was, or had been, professionally adequate, the pre-trial competency examination actually performed in Mr. Thompson's case)

would have been different. Specifically, but not exclusively:

i. Counsel failed to discover and interview pertinent, available witnesses who could have testified and/or informed appropriate mental health experts of Mr. Thompson's descent into intermittent and delusional behavior following high school

. . . .

. . . Had counsel been informed, they would have recognized that witness accounts, of Petitioner's bizarre change in behavior signaled the onset of mental illness. The lingering question would have been answered. The outcome of Petitioner's capital conviction and sentence probably would have been different.

(DCTR 17; footnotes omitted). The amended petition for writ of habeas corpus was signed by Stephen M. Kissinger.

b. Discovery

On November 2, 1998, the magistrate judge held three telephone conferences with Attorney Kissinger and Assistant Attorney General Jennifer Smith regarding Thompson's request for discovery regarding those matters alleged in the petition, to which Respondent objected. The court's order states that, during the hearing, Kissinger advised that he needed to obtain the depositions of three mental health expert personnel who had seen and treated Thompson during his period of incarceration. Respondent maintained his objection that the allegations before the court did not establish good cause for discovery as required under Rule 6(a) of the Rules Governing Section 2254 Cases

in the United States District Court. That same day the court entered an order allowing Thompson to take the depositions of Dr. Michael Rutter, Dr. Robert Hoen, and Dr. John Pruett, mental health experts. The order further allowed Respondent the right to take the depositions of Thompson's two experts, neuropsychologist Barry Crown, Ph.D, and psychologist Faye Sultan. (DCTR 18). The magistrate judge noted that the execution of Thompson would violate the Eighth Amendment due to Thompson's incompetence. The order also noted a *Brady* claim.[5]

Also on November 2, 1998, Thompson filed his initial witness list. His "[e]xpert witnesses and testimony" included the following:

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[5] Although not fully articulated as such, the magistrate judge appears to have based its conclusion on the following allegation in Thompson's amended petition, which the court quoted in its order:

> 41. CLAIM 41 – BRADY CLAIM
>
> a. Throughout Petitioner's court proceedings the prosecutor engaged in false and/or misleading questioning and use of reports to argue that Petitioner was competent and not mentally ill. The prosecutor misled Petitioner's judge and jury despite having evidence to the contrary, and without revealing such evidence, thereby committing gross misconduct. For example, during the Petitioner's postconviction proceedings, the state argued that Petitioner was not mentally ill, was competent at the time of trial, was presently competent, and was competent to be executed, despite ten years of records to the contrary. Institutional records clearly illustrate Petitioner's 'significant history of psychosis requiring multiple medications.' Petitioner's mental health treatment plan contemporary to the postconviction hearing reveals a diagnosis of schizophrenia with presenting problems of auditory and visual hallucinations and paranoid ideation. . . .

(DCTR 18).

a. Dr. Barry Crown, Penthouse Ste 310, Red Road, South Miami, FL 33143, will provide foundation testimony to establish himself as an expert in neuropsychology. He will testify that he has been provided with background information regarding Petitioner's medical and social history, that he has interviewed, and administered a battery of indicated neuropsycholgical tests to the Petitioner. He will testify that the results of those tests indicate that Petitioner suffers from organic brain damage. *He will testify that the brain damage observed, as well as Petitioner's social and medical history, is consistent with schizophrenia. He will testify that Petitioner's brain damage substantially impaired the ability of the Petitioner to distinguish between right and wrong and/or to conform his conduct to the requirements of the law and/or prevented Petitioner from doing the same.* He will testify that Petitioner's brain damage prevented Petitioner from meaningfully assisting in his own defense at trial and during state post-conviction proceedings and/or from fully comprehending the nature of those proceedings. He will further testify that arguments regarding Petitioner's mental state made by counsel for the State of Tennessee during state post-conviction proceedings were both outside the scope of a lay person's knowledge and that the prosecutor's statements misrepresented Petitioner's prison medical records.

b. Dr. Faye Sultan, 8430 University Executive Park Drive, Suite 690, Charlotte, NC 28262, will provide foundation testimony to establish herself as an expert in clinical and forensic psychology. She will testify that she has been provided with background information regarding Petitioner's medical and social history, that

she has interviewed, and administered a battery of indicated psychological tests to the Petitioner. *She will testify that, on the basis of her examination, it is her expert opinion that Petitioner suffers from schizophrenia and did so at the time of the offense and at the time of trial. She will testify that Petitioner's mental illness was severe and that it substantially impaired the ability of the Petitioner to distinguish between right and wrong and/or to conform his conduct to the requirements of the law and/or prevented Petitioner from doing the same.* She will testify that Petitioner's mental illness prevented Petitioner from meaningfully assisting in his own defense at trial and during state post-conviction proceedings and/or from fully comprehending the nature of those proceedings. She will further testify that arguments regarding Petitioner's mental state made by counsel for the State of Tennessee during state post-conviction proceedings were both outside the scope of a lay person's knowledge and that the prosecutor's statements misrepresented Petitioner's prison medical records.

(DCTR 19) (emphases added).

On November 30, 1998, Respondent appealed the magistrate judge's discovery order. The district court affirmed the ruling. Significantly, the district court stated the following:

> Additionally, if the facts are developed to show that petitioner's mental health should have been introduced as mitigating evidence, petitioner may be entitled to relief. The magistrate judge heard argument of counsel and then ruled that certain specific discovery would be allowed. . . . Not only has Thompson raised the

> issue of ineffective assistance of counsel for failure to fully explore his mental health for mitigating purposes at his sentencing, which trial counsel testified he should have explored Thompson's mental health further . . . ; the record also includes factual allegations that there was some mental health evidence that could have been introduced as mitigating evidence. Furthermore, Thompson alleges he did not receive a full and fair post-conviction hearing in state court because he was denied funds to hire a mental health expert to prove his incompetency/insanity at trial and at execution. If the fact are fully developed, he may be able to demonstrate he is entitled to relief.
>
> After a cursory review of the numerous volumes of state documents[ ] involved in this case, it appears that Thompson has alleged a factual basis for some of his claims and the magistrate judge so found. For example, petitioner claims trial counsel failed to properly investigate his mental health history and present mitigating evidence at trial and sentencing. Petitioner contends he had two serious head injuries and intermittent bizarre and delusional thought patterns and witnesses to testify to such, and this mitigating evidence should have been introduced. Furthermore, petitioner contends that his institutional records reveal a diagnosis of schizophrenia with problems of auditory and visual hallucinations and paranoid ideation. If petitioner proves these factual allegations, he may be entitled to relief.

(Footnote omitted) (DCTR 22).

On December 24, 1998, Respondent filed his initial expert witness list disclosure. It listed simply Dr. Theodore H. Blau, who would "testify as an expert in the area of

forensic neuropsychology. Dr. Blau will be called, if necessary, to rebut the testimony of petitioner's expert witnesses, Dr. Barry Crown and Dr. Faye Sultan, as disclosed in petitioner's initial witness list of October 30, 1998." (DCTR 24).

On December 29, 1998, Attorney Kissinger moved to appear *pro hac vice*. (DCTR 25).

On February 3, 1999, the district court granted Thompson's request for an extension of time to conduct discovery. The court set the discovery date at June 11, 1999, and the dispositive motion cutoff at July 2, 1999. (DCTR 32).

On February 12, 1999, Thompson filed an *ex parte* motion for a temporary mandatory restraining order, for preliminary and permanent injunctive relief, and for an order finding Thompson incompetent to proceed, continuance, and to toll. (DCTR 34). In support, Thompson alleged in part as follows:

> 1. Petitioner suffers from schizophrenia. During the vast majority of his incarceration Respondent has medicated Petitioner in order to treat his mental illness.
>
> 2. On or about September 1998, Respondent stopped providing Petitioner with appropriate psychiatric medication.
>
> 3. Petitioner's mental health thereafter radically declined. Petitioner is now unable to meaningfully assist counsel or understand the nature of the proceedings in which he is being required to participate. Moreover, because of the severe nature of Petitioner's mental illness, Respondent's refusal to provide appropriate psychiatric care is tantamount to subjecting Petitioner to physical torture. *See,* Exhibit A, Declaration of Faye Sultan PhD. attached.
>
> . . . .
>
> 6. Petitioner has no remedy at law. . . . Given the Petitioner's incontrovertible right both to receive proper psychiatric care and to seek federal habeas corpus relief the likelihood that he will prevail on the merits of his motion are great. Should Respondent be allowed to continue to deprive Petitioner of proper psychiatric care Petitioner will suffer irreparable injury. Not only is he being rendered incompetent, he is, for all intents and purposes, being tortured.

(Footnotes omitted.). The motion was signed by Attorney Kissinger (by permission). (DCTR 34).

Attached to the February 1999 motion is the declaration of Faye Sultan, Ph.D, a clinical psychologist. Sultan stated in relevant part that

> At the request of attorneys at the Federal Defender Services of Eastern Tennessee, I initiated a psychological evaluation of Mr. Gregory Thompson in August, 1998. Formal psychological testing and extensive clinical interview were conducted with Mr. Thompson at the Riverbend Maximum Security Prison in Nashville, Tennessee on 8-20-98. This interview was conducted as a "Contact Visit", with no physical barrier between this examiner and Mr. Thompson, and Mr. Thompson was not physically restrained in any way.

> In addition to the data gathered during this examination, I was asked to review extensive documentation about Mr. Thompson's psychiatric, military, and legal history. These data also serve as bases for the opinions rendered here. These data include psychiatric records and examinations regarding Mr. Thompson for approximately the past fifteen years, administrative and medical records from the Tennessee Department of Corrections, and legal and police documents relating to the original offenses for which Mr. Thompson is currently incarcerated. In total, hundreds of pages of records and documents have been reviewed for the purpose of this evaluation.

(DCTR 34). Dr. Sultan also stated that in August 1998 Thompson met all of the diagnostic criteria for the major mental illness schizophrenia, episodic, with interepisode residual symptoms. She further indicated that Thompson's condition had rapidly deteriorated between August 1998 and February 1999. In Dr. Sultan's opinion, Thompson was experiencing a severe psychiatric crisis, making him unaware of his surroundings, and requiring immediate emergency attention. (*Id*).

On April 7, 1999, Thompson moved to withdraw his *ex parte* motion for injunctive relief and for an order finding him incompetent to proceed, principally because on April 6, 1999, Dr. Sultan saw Thompson and concluded that his condition had improved, due to an adjustment in his medication. Thus, the factual basis for the motion no longer existed. (DCTR 64). On April 29, 1999, the court granted the motion to withdraw the ex parte motion. (DCTR 67).

On June 28, 1999, the district court entered an order extending the discovery deadline to July 30, 1999. The

court extended the deadline to allow Respondent to depose Thompson's expert witnesses, Drs. Crown and Sultan, and to allow Petitioner to depose Respondent's expert witness, Dr. Theodore Blau. On July 9, 1999, Respondent filed a motion for summary judgment as to all claims raised in the amended petition for writ of habeas corpus. (DCTR 81-82). On July 15, 1999, Thompson deposed Respondent's expert, Dr. Blau. On July 20, 1999, Respondent deposed Petitioner's expert. Dr. Crown.[6] On July 29, 1999, Thompson filed his response to Respondent's motion for summary judgment.

On August 2, 1999, Respondent filed a motion for reimbursement of deposition expenses. (DCTR 87). Respondent claimed that Dr. Crown's deposition testimony was considerably different than that represented in Petitioner's initial witness list. Specifically, Respondent alleged that, based on Petitioner's initial disclosure concerning Dr. Crown's testimony, particularly as to Petitioner's mental state at the time of the offense, "*i.e.*, his ability to distinguish between right and wrong and/or to conform his conduct to the requirements of law, competency at the time of trial," counsel for Respondent traveled to Miami, Florida to depose Dr. Crown. Respondent further claimed that, at the beginning of the deposition, he was presented "for the first time" with an affidavit indicating Dr. Crown's proposed testimony, which was significantly different from the October 30, 1998, initial witness list disclosure. The affidavit indicated no opinion as to Thompson's mental state at the time of the offense or at

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[6] As will be explained shortly, counsel for Respondent deposed Thompson's other named expert, Dr. Faye Sultan, PhD. on July 22, 1999.

trial, no opinion indicating that brain damage substantially impaired Thompson's ability to conform his conduct to the requirements of law and/or to distinguish between right and wrong, and no opinion concerning Thompson's ability to assist counsel in his defense at trial or comprehend the nature of that proceeding.

Respondent alleged that, "contrary to representations in Petitioner's initial expert disclosure, Dr. Crown testified in his deposition that he had not rendered, nor had he been asked to render, an opinion concerning Petitioner's mental status at the time of the offense in this case." (DCTR 87). The motion stated that Dr. Crown testified that he was also not asked to render an opinion concerning Petitioner's competence at the time of trial. The motion further alleged that "Dr. Crown testified that he had seen petitioner on one occasion, June 12, 1998, and was prepared to render an opinion concerning petitioner's competence and mental status on *that* day." Thus, in Respondent's view, "Dr. Crown offered no testimony pertinent to any claim presented in the amended petition for writ of habeas corpus." Respondent therefore claimed that, had he been advised of the precise nature of Dr. Crown's testimony, as required under Fed. R. Civ. P. 26(a)(2)(B) and by the district court's order of March 11, 1998, he likely would not have deposed Dr. Crown. Respondent contended that, given the clear representations in his October 1998 expert disclosure statement, Petitioner had a duty to disclose the nature of Dr. Crown's testimony. Respondent sought an order requiring Petitioner to reimburse Respondent in the amount of $2,768.71 for expenses incurred in connection with the July 20, 1999, deposition of Dr. Crown.

On August 4, 1999, Petitioner filed a motion in limine, seeking to exclude Dr. Blau's testimony on the grounds

that Dr. Blau neither formed an opinion nor was asked to form an opinion regarding any of the issues raised in the petition: "Despite all issues being clearly framed by the allegations in the petition, Respondent never sought, nor did Dr. Blau render, any opinion contrary to such allegations." (Footnote omitted.). (DCTR 88). Also on August 4, Petitioner filed a motion for costs incurred in deposing Dr. Blau. Petitioner alleged in pertinent part:

> 2. On July 15, 1999, undersigned counsel conducted the deposition of Dr. Blau in order to discover the substance of his testimony at the evidentiary hearing. At that time Dr. Blau testified that he had been asked to render an opinion only in regard to Mr. Thompson's competency to proceed in the instant action . . . ; that he had not reached any opinion other than that reflected in his report on the competency to proceed . . . ; and that in order to render additional opinions he would require further interviewing and testing of Mr. Thompson. . . .
>
> 3. It is clear that although Respondent was on notice of Petitioner's mental health claims which are detailed in his habeas petition and was on notice regarding Petitioner's anticipated expert's testimony, Respondent either instructed Dr. Blau not to render any opinion during deposition regarding the issues in the petition or Dr. Blau failed to formulate such opinions. *It appears that Respondent made the strategic decision to limit Dr. Blau's testimony to Mr. Thompson's competency to proceed given Dr. Blau's sworn testimony that his opinion was limited to Mr. Thompson's competence to proceed, the fact that Dr. Blau only evaluated Mr. Thompson on one occasion for the specific purpose of competency to proceed, and*

that Respondent did not provide a copy of Petitioner's habeas petition to Dr. Blau.

4. Undersigned counsel relied upon Respondent's representation that Dr. Blau would rebut Petitioner's expert witnesses. Had undersigned known that Dr. Blau's opinion was limited to Mr. Thompson's competency to proceed, an issue which is no longer before this court, he would not have taken Dr. Blau's deposition and incurred expenses totaling $4,097.01.

(DCTR 89) (emphasis added) (footnote omitted). Petitioner requested a court order requiring Respondent to pay those costs. The motion for costs is signed by Stephen M. Kissinger.

On August 5, 1999, Thompson filed a response opposing Respondent's motion for reimbursement of deposition expenses. In it he contended that the opinions Dr. Crown expressed in his deposition were materially consistent with Thompson's initial witness list. In response to Respondent's contention that Dr. Crown failed to provide an opinion at deposition regarding Thompson's mental condition at the time of the offense, Thompson stated that "[t]his allegation is untrue or irrelevant for at least two reasons." First,

5. Insofar as Respondent's complaint relates to Dr. Crown's response to the Assistant Attorney General Pruden's very few questions which Respondent elected to attach to his motion, Dr. Crown was not asked whether he had an opinion regarding Petitioner's mental condition at the time of the offense *or* at trial. Instead Mr. Pruden

chose to focus on the communication between Dr. Crown and Respondent's counsel.[7]

. . . .

7. Not one of these questions asked whether Dr. Crown had an opinion on the issue of mental state at the time of the offense, at trial, or at any other time for that matter. They queried only regarding the communications between Dr. Crown and undersigned counsel. As a matter of fact, only once in the excerpts attached to Respondent's motion does Mr. Pruden ask any question which could reasonably be interpreted as seeking Dr. Crown's opinions on these issues.

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[7] 6. Respondent posed the following questions:

Have you been asked to render any determination about whether he was competent to stand trial at his criminal trial?

(Crown deposition at Page 7, lines 11-13)

So if I understand you correctly, you were only asked [by Respondent's counsel] to make a competency determination at the time you met Mr. Thompson?

(*Id.* at Page 7, lines 19-21)

Have you been asked to render any opinions concerning Mr. Thompson's mental status at the time of the murder of Brenda Lane?

(*Id.* at Page 8, lines 7-9)

Not specifically. Does that mean that you have not been asked that specific question?

(*Id.* at Page 8, lines 11-12[)]

So you have not been asked to render an opinion to Mr. Kissinger yet one way or the other regarding Mr. Thompson's ability to distinguish between right and wrong or conform his conduct to the requirements of the law at the time of Ms. Lane's murder?

(*Id.* at 17-20).

8. On that occasion, Dr. Crown responded that he was unable to render such an opinion because he could not be certain whether he had been provided all relevant information. Crown deposition at Page 9, lines 4-15. Rather than show that he had no opinion on a material issue, Dr. Crown's answer demonstrated that he would not carelessly issue an opinion until counsel for Respondent defined the facts upon which counsel wished Dr. Crown to base that opinion. Despite Dr. Crown's qualified response, counsel for Respondent never asked Dr. Crown whether, *assuming that Dr. Crown had all relevant information,* he had an opinion regarding Mr. Thompson's mental state at the time of the offense and/or at trial, nor did counsel provide Dr. Crown with supplemental fact which Respondent deemed relevant and then ask him whether, based upon the combined information, he held an opinion on those regards.

9. The reasons Respondent failed to discover Dr. Crown's opinions in these areas were not because Dr. Crown held no such opinions. Respondent's counsel either made a strategic decision to focus on the conduct of counsel (or perhaps to attempt to create the *illusion* that Dr. Crown's opinions regarding these areas will come as a complete surprise to the Respondent when they are stated at hearing), *or* he simply neglected to ask the relevant questions.

(DCTR 90).

Thompson articulated a second reason, namely that Dr. Crown's deposition did substantially conform to the information contained in his initial witness list because Crown stated during his deposition "that Petitioner suffers from bipolar disorder of a schizo-affective type *and* that

the onset of this affliction was prior to the alleged offense. Crown deposition at Pages 32-34, *in passim.*" Thompson added that "[u]nless Respondent can seriously maintain that it is *material* in this case whether Dr. Crown found that Petitioner suffered from one severe schizotypal mental illness *at the time of the offense as well as his state court trial* rather than another severe schizotypal mental illness, Dr. Crown's deposition testimony is clearly consistent with the information contained in Petitioner's Initial Witness List." Thompson also alleged that Respondent was not in a position to complain that Dr. Crown's testimony did not make the connection between Petitioner's mental illness and competency at the time of the offense, because Respondent "with full knowledge that Dr. Crown was of the opinion that Petitioner was severely mentally ill at the time of the offense, either chose not to inquire regarding the afore-described connection or *forgot to do so.*" (DCTR 90) (emphasis added). Thompson therefore claimed that he had demonstrated that the information in his initial witness list was consistent with Dr. Crown's testimony. He further claimed that even if it was materially inconsistent, Respondent could not complain because he had previously made this allegation to the magistrate judge, who granted Respondent the right to depose both Drs. Crown and Sultan before Respondent ever contacted Dr. Blau. Thus, Thompson claimed that Respondent had been granted the opportunity to determine the exact opinions of Dr. Crown before Dr. Blau was ever contacted. (DCTR 90).

Next, Thompson asserted that Dr. Blau stated during his deposition that he was contacted by Respondent's counsel, Pruden, on November 2, 1998, to retain him as a psychological expert and that he was asked simply "to

review records in respect to competence to proceed regarding Mr. Thompson, and possible questions were whether Mr. Thompson is competent to act as a party participant in habeas corpus proceedings," and also whether he "could determine psychologically his mental condition and status with respect to his capacity to understand his legal position and his options." (DCTR 90) (quoting Deposition of Theodore H. Blau, Ph.D., July 15, 1999, Page 5, lines 8-19). Thompson further alleged that Dr. Blau was asked whether he had been asked to examine Thompson regarding any area other than competency and that "[h]is response clearly demonstrated that not only had he not examined and/or reached any opinions in any area other than Petitioner's present competency, the only neuropsychological examination he had conducted was 'at best' . . . a screening examination." (DCTR 90 ¶ 6). Thompson therefore moved for an order denying Respondent's motion for reimbursement of deposition expenses. (DCTR 90).

In his reply, Respondent stated simply that the documents attached to its motion for reimbursement plainly demonstrated that Thompson's October 1998 disclosure was materially different from the testimony offered at Dr. Crown's deposition and in his affidavit. (DCTR 91). Attached as an exhibit was a complete copy of Dr. Crown's July 20, 1999, deposition. Much of it bears repeating here:

Q: Specifically, what issues regarding Mr. Thompson and his case have you been asked to review and render expert opinions on, sir?

A: At this point, I have been asked to consider his competency and also his mental status.

Q: Okay. Let's take them one at a time, then. Competency, are you talking strictly about his present competency in the habeas corpus proceedings?

A: I am talking about his competency at the time that I saw him.

Q: Have you been asked to render any determination about whether or not he was competent to stand trial at his criminal trial?

A: No.

Q: Has anything been said to you that would lead you to believe that you might be asked at a future date prior to the evidentiary hearing to render such an opinion?

A: It hasn't been suggested or asked of me.

Q: So if I understand you correctly then, you were only asked to make a competency determination at the time you met Mr. Thompson?

A: That is correct.

Q: And when was that, sir?

A: June 12th of 1998.

Q: All right. *His mental status. Please elaborate for me, what about his mental status have you been asked to opine?*

A: *I have been asked to evaluate it.*

Q: His mental status at present?

A: Well, it was his status as of the time that I saw him. I haven't seen him since June 12th of 1998.

Q: *Have you been asked to render any opinions concerning Mr. Thompson's mental status at the time of the murder of Brenda Lane?*

A: *Not specifically, no.*

Q: *Not specifically. Does that mean that you have not been asked that specific question?*

A: *That is correct.*

Q: *Have you rendered an opinion, though, in that regard?*

Q [sic]: *No, not as of this time.*

Q: *So you have not rendered an opinion to Mr. Kissinger yet one way or another regarding Mr. Thompson's ability to distinguish between right and wrong or conform his conduct to the requirements of the law at the time of Ms. Lane's murder?*

A: *That is correct.*

Q: *Has Mr. Kissinger, or anyone else representing Mr. Thompson, represented to you that they would like you to render such an opinion during the course of your employment?*

A: *No.*

Q: Just so I am clear then, your mental status evaluation of Mr. Thompson is only to evaluate his mental status at present?

A: I have only seen him on one occasion, June 12th of 1998. So what I have to say would be related to that examination. I have looked at other records, but I don't know they are necessarily complete, and I couldn't render an

opinion based on the lack of completeness, or what I assume is the lack of completeness.

Q: So you don't feel that based on the materials that you have reviewed to date that you could, based on your professional experience, render an opinion about Mr. Thompson's mental state say back in 1985 at the time of the murder?

A: As I sit here today, I could not.

Q: So you are not prepared to render any opinion in that regard today?

A: That is correct.

Q: What materials have you been provided to review concerning Mr. Thompson?

A: I have seen what I believe to be his Department of Corrections file from it's [sic] inception.

Q: And when you say his Department of Corrections file, do you mean his medical/mental health file?

A: It's his medical file, as well as his general file, including disciplinary reports, including adjustment reports.

Q: Have you reviewed any other records?

A: I have seen the depositions of three of the employees of Prison Health Services. I have seen the reports of the mental health facility that Mr. Thompson spent thirty days in prior to his original trial. I have seen the testimony of the mental health professions at his trial, Dr. Kogley.

Q: Cobley?

A: Cobley. I have seen the materials from Dr. Blaire.

Q: How about Dr. Watson?

A: Watson. I have seen Dr. Watson.

Q: When you say materials from Dr. Blaire, does that simply mean her testimony, or have you seen other –

A: I have seen the raw data, or parts of raw data. Actually, the entire raw data are not in the materials that were provided to me. And then I have seen Dr. Blau's report and Dr. Blau's raw data.

Q: And you just received Dr. Blau's –

A: Correct.

(DCTR 91).

Dr. Crown also indicated that he had reviewed Thompson's medication portfolio from his records at Riverbend Maximum Security Institution. When asked, Dr. Crown stated that he had not read, and not been asked to read, the trial transcript, but that he had asked Mr. Kissinger "to provide me with whatever materials he wished." (DCTR 91). Dr. Crown acknowledged that he had not given Kissinger a specified list of items he wished to review, but was "relying on whatever it is Mr. Kissinger" gave him.

Dr. Crown also stated that he met with Thompson on June 12, 1998, at Riverbend for about two and one half hours. Dr. Crown indicated that, at that time, he took a brief history, a standard basic demographic clinical

interview, and administered a group of tests.[8] Dr. Crown testified that the only written record of his evaluation was his July 20 affidavit; that he would only prepare a written report if Kissinger asked. He also indicated that Kissinger had not at that time asked him to do so.

Dr. Crown opined that Thompson suffers from an auditory processing deficit. He further indicated that Thompson has some sort of organic brain damage, but that he did not pinpoint it to a specific portion of the brain. Dr. Crown stated that he did not intend to make any further evaluation of Thompson's organic brain damage unless asked. Dr. Crown indicated that he knew that Thompson had suffered traumatic head injuries. He testified that he had not seen Thompson's military medical records. Dr. Crown testified that the organicity was secondary to other mental impairments, namely schizo-affective disorder, bipolar subtype, with organic components. Dr. Crown stated that he reached this conclusion

> from looking at the reports of the treating physician, the psychiatrists, and psychiatric nurses, and nurse practitioners that have had the opportunity to monitor him over the last fourteen years, that I have concluded that he's best treated with anti-psychotic medication, that schizo-affective disorder is a disorder that affects

[8] Dr. Crown stated that he administered the following tests: The Shipley Institute of Living Scale; the G-F-W Auditory Selective Attention Test; the Category Test; the Kaufman Neuropsychological Assessment Procedure; the Luria Memory Test; the Reitan-Indiana Aphasia Screening Test; the Rey-Osterreith Complex Figure Test; the Trailmaking Test; Word Generation, F/A/S; Finger Oscillation Test; and the Wisconsin Card Sorting Test.

thoughts related to reality and results in distortions of reality.

It also results in distortions of affect, meaning, the way that behavior is expressed. And I believe that his affect has been variable from rather depressed to highly agitated and aggressive. And so, putting that together, I believe he does have a schizo-affective disorder of the bipolar type, meaning, there is a considerable spread in his emotionalities, that there is a distortion in his perception of reality, that he tends to fragment at times, and tends to be directed by hallucinatory activity.

. . . [I]n Mr. Thompson's case, there are notations throughout his medical records that he has auditory hallucinations. He also related to me that at the time I saw him he was auditory hallucination free, but that he frequently got command hallucinations that there were voices coming from within him that were telling him what to do, which is what happens in an auditory hallucination state.

(DCTR 91). The following colloquy between counsel for Respondent and Dr. Crown, then took place:

> Q: Based on your review of Mr. Thompson's records or the records that were provided to you, what do you conclude, or when did you conclude, was the onset of these auditory hallucinations?
>
> A: *I have no real pinpoint. For that, most typically, people with schizo-affective disorder tends to develop in late adolescence to early adulthood.*

> Q: From the materials you have reviewed, do you see anything in those materials that show that this is when it occurred in Mr. Thompson?
>
> A: *I believe he began to have a more difficult time with life in his – in the last stages of his military service. So I believe that the beginnings of it would be tracked to that. I haven't seen the records, but I believe that that's probably when I would anticipate that it would have begun.*

(Emphases added.)

Counsel for Respondent also asked Dr. Crown whether he had talked with any of Thompson's family members to gain insight into his background while growing up. Dr. Crown stated that he had not, nor had he spoken with school teachers, counselors, or ministers. Dr. Crown also indicated that he had not spoken with Joanne McNamara, or Arlene Cajulao.

Next, counsel asked Dr. Crown:

> Q: And if I understood your answers earlier correctly, you do not have an opinion at this time as to the exact nature of this brain damage for which you have seen some indicia?
>
> . . . .
>
> A: I don't specifically know the causation. I believe it may be secondary to his thought disorder since we know that in people who do have chronic thought disorders that the thought disorder itself may either be caused by or may result in some damage to the

brain. For example, schizophrenics very often have enlarged ventricles of the brain.

Q: I notice that you did not attempt to administer an MMPI to Mr. Thompson. The reason for that, sir?

A: In the regular course of my neuropsychological evaluations, I tend not to administer a personality questionnaire. I leave that for, or the assessment of personality, specifically to a clinical psychologist or a psychiatrist.

Q: In this case, this would be something that you would defer basically to Dr. Sultan?

A: I would defer in terms of administering or interpreting of the personality testing. Yes.

Q: Would an MMPI-2 be useful in terms of assessing organic brain damage?

A: No, not necessarily. No.

. . . .

A: No. If I thought it was necessary to form a neuropsychological opinion, I would have given it.

Q: And in this case you didn't?

A: That is correct.

Q: And part of that is because you are not interested in determining whether or not he can distinguish between right and wrong?

A: I was asked to assess his neuropsychological status, and that to [sic] extent, I wasn't asked to consider issues of determining right

or wrong, sanity, and I wasn't asked specifically to consider personality. But when I looked at him, it was clear to me that Mr. Thompson also had personality problems. He had a thought disturbance.

I assumed that someone else would be looking at him in terms of those thought disturbances, the personality difficulties, *and I just recently learned that Dr. Sultan had looked at him.*

(Emphasis added.) Dr. Crown stated that he had worked with Dr. Sultan on several capital cases.

Counsel for Respondent recapped:

Q: My understanding then is you were solely asked to talk about Mr. Thompson's current competency. That's what you have been asked to render an opinion about – or competency at the time you saw him?

A: Competency and mental status.

Q: In terms of competency, did you evaluate him as being competent?

A: At the time that I saw him, it's my opinion he was competent.

(DCTR 91).

In response to Thompson's motion for costs, Respondent reiterated that in his October 30, 1998, initial witness list, Thompson stated that he intended to call two expert witnesses, Dr. Barry Crown and Dr. Faye Sultan. Respondent stated that with regard to the substance of the expert testimony, Petitioner indicated that each would testify in pertinent part that Petitioner's mental condition

substantially impaired his ability to distinguish between right and wrong and/or to conform his conduct to the requirements of law. Respondent contended that on December 24, 1998, Respondent notified Petitioner that he intended to call Dr. Theodore Blau as an expert in the area of forensic neuropsychology to rebut the testimony of Drs. Crown and Sultan. Respondent further claimed that, pursuant to the November 2, 1998 order of the magistrate judge, Respondent conducted the depositions of Dr. Crown and Dr. Sultan on July 20, 1999, and July 22, 1999, respectively.[9] Respondent further contended that, prior to those depositions, Respondent received no information from Petitioner other than that contained in the initial witness list, nor had Respondent been provided with any information concerning the data or other information considered by the witnesses in forming their opinions, as required by Fed. R. Civ. P. 26(a)(2)(B). Finally, Respondent asserted that, although it was clear from Respondent's notice of expert witnesses that Dr. Blau would be called to rebut the testimony of Petitioner's experts, Petitioner chose to schedule the deposition of Dr. Blau on July 15, 1999, before the previously-scheduled depositions of Drs. Crown and Sultan.

c. The District Court's Ruling on the Rule 56 Motion

On February 17, 2000, the district court issued a Memorandum granting Respondent's summary judgment motion as to all claims and dismissing his § 2254 motion. The district court stated in relevant part:

[9] Kissinger defended both depositions.

> *Petitioner claims experts recently obtained by him have revealed that he was incompetent under Tennessee law at the time of the crime and throughout his court proceedings. Petitioner has failed to state the name of the expert and failed to provide the proof of these revelations. The Court has read the deposition of Dr. Crown, (Court File No. 119, Exhibit 1) but was unable to located [sic] his opinion that Thompson was incompetent at the time of the crime and throughout his court proceedings. As a matter of fact, Dr. Crown stated he was not asked to render any determination about whether or not Thompson was competent during his state jury trial. (Court File No. 91, Exhibit 1, pp. 7-9). Dr. Crown stated he was only asked to make a competency determination at the time he met Mr. Thompson on June 12, 1998.* After meeting with Thompson for two and a half to three hours, which consisted of taking a brief history for twenty-five to thirty minutes and the remainder of the time was spent administering tests, it was his opinion that Thompson was competent on June 12, 1998. (Court File No. 91, Exhibit 1, p. 7-47).
>
> Dr. Crown did testify Thompson had a significant auditory processing deficit which means he is easily distracted by external auditory stimuli. (Court File No. 91, Exhibit 1, p. 20). He further testified that some of the test results led him to conclude that there was some sort of organic brain damage. However, he is not able to make any assessment of the severity of the damage nor does he intend to make such an evaluation. (Court File No. 91, Exhibit 1, pp. 24-28). Dr. Crown believes this organicity is secondary to a thought disorder which he refers to as a schizoaffective disorder-bipolar subtype with organic

components. Dr. Crown bases his conclusion on the reports of the people who have treated Thompson for the last fourteen years. (Court File 91, Exhibit 1, p. 35).

Respondent hired Dr. Blau to rebut Dr. Crown's testimony. Portions of Dr. Blau's testimony have been filed with the Court. Dr. Blau testified he did not observe or see any indications of organic brain damage on the test he administered. Dr. Blau found Thompson's responses during testing were rational and appropriate. (Court File No. 89, Attachment C, pp. 31, 47-48).

Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute. . . . Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime and at the time of his jury trial. Nor has Thompson provided this Court with any significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence.

Petitioner had two different psychological evaluations and both resulted in findings of competency at the time of the crime and at the time of trial. Additionally, the record shows that trial counsel did reasonably investigate Thompson's background and mental health history.

Memorandum dated February 17, 2000 at 53-55 (emphases added) (DCTR 124).

d. The Motion to Alter or Amend

On March 2, 2000, Petitioner filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59. By way of introduction, the motion states:

> As an initial point, undersigned counsel apologizes for any lack of clarity which may exist in Petitioner's pleadings.1 Though counsel disagrees with the Court's criticism of those pleadings, the fact that the Court's Decision is contrary to controlling authority and sound legal reasoning provides empirical evidence that undersigned counsel has somehow failed to bring that authority and reasoning to the Court's attention. Mr. Thompson should not suffer because of counsel's shortcomings. Furthermore, this Court should not face almost certain reversal simply because counsel phrased otherwise irrefutable arguments in such a way that the Court remained unaware of the proper resolution of Respondent's Motion for Summary Judgment. In an effort to fulfill his duty to both his client and the Court, counsel now attempts to phrase those arguments in such a way that the Court is fully aware of their nature and asks this Court to alter or amend the judgment entered herein to fully address such arguments and thereafter deny Respondent's Motion for Summary Judgement.2

1 The Court's Decision contains several negative comments regarding perceived deficiencies in undersigned counsel's pleadings.

2 Though Mr. Thompson does not waive or concede any of the issues and/or arguments raised by the pleadings which were not expressly or previously waived or conceded, and the same are reasserted herein, Petitioner's Motion to

> Alter or Amend centers on two primary issues: (1) whether the procedural bar which was, *or would be,* applied to claims arising from facts not heretofore presented to the state courts of Tennessee is independent of federal law; and (2) whether the State of Tennessee's interference with Mr. Thompson's attempts to present claims arising from his *unquestionably* severe mental illness *either* deprived Mr. Thompson of a full and fair opportunity to present the facts supporting those claims to the state courts of Tennessee *or* provided "cause" for not presenting the facts supporting those claims to the state courts of Tennessee.

(DCTR 126, at 1-2). Thompson then presented argument on two issues, namely, that "The Tennessee Courts Will Not Apply the Tennessee State Post-Conviction Statute of Limitations to Petitioner's 'Later-arising' Claims in a Manner that is Independent of Federal Law," and that "The Tennessee Court's Refusal To Afford Petitioner Mental Health Services During State Post-conviction Proceedings Constituted a State Obstacle to the Presentation of Facts And/Or Claims Arising From Mr. Thompson's Mental Illness." In conclusion, Thompson reiterated that although the motion to alter or amend did not specifically address every error in the district court's decision, which he specifically reasserted, "[t]he errors addressed herein, however, go to the very integrity of the judicial process." (DCTR 126 at 10). The motion was signed by Stephen M. Kissinger.

e. The District Court's Ruling on the Motion to Amend

On March 31, 2000, the district court denied the motion, holding that Thompson had failed to present any additional information which justified reconsideration and an order altering or amending judgment. (DCTR 128).

On April 21, 2000, Thompson filed his notice of appeal to this Court.

f. The Rule 60(b) Motion

On March 2, 2001, Thompson, through undersigned appellate habeas counsel, Dana C. Hansen, also of the Federal Defenders Office of Eastern Tennessee, filed a motion under Fed. R. Civ. P. 60(b).[10] In that motion, Thompson "respectfully request[ed] the Court to relieve Mr. Thompson from the final order entered on February 17, 2000, for the purpose of entering an order to supplement the record with Respondent's deposition of Dr. Faye E. Sultan, Ph.D, and the accompanying report of Dr. Sultan." (DCTR 133, at 1). Thompson claimed that the petition was timely. "The order entered in Mr. Thompson's case granting summary dismissal of his amended petition for writ of habeas corpus was entered on February 17, 2000. Therefore this motion, being filed within one year of the order, is timely." (*Id.*)

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[10] On March 2, 2001, Hansen filed with this Court a motion to hold case in abeyance pending Thompson's contemporaneous Rule 60(b) motion in the district court. Dr. Sultan's deposition is attached to that motion. We denied that request by order dated March 21, 2001.

Thompson explained "Dr. Sultan's Involvement in this Case:"

> Earlier in Mr. Thompson's District Court proceedings, Respondent took the deposition of Dr. Sultan. The district court record presently contains a summary of her conclusions in an expert disclosures pleading (R. 19) and an affidavit detailing her opinion regarding Mr. Thompson's mental health status in February 1999 (R. 34). Having examined Mr. Thompson and viewed his social and medical history, Dr. Sultan executed a report in addition to her testimony at Respondent's deposition. (Attachments A & B).
>
> Although this Court denied Mr. Thompson's mental health related claims partially on procedural grounds, Dr. Sultan's deposition and report are important to the merits of the claims. With regards to the merits of Mr. Thompson's mental health related claims, he maintains that he made a sufficient showing of a genuine issue of material fact to overcome Respondent's summary judgment motion notwithstanding Dr. Sultan's opinions. However, Dr. Sultan's opinions certainly are directly relevant to the mental health related claims and should be considered by the Court. *Counsel for M Thompson engaged in* [sic] *Dr. Sultan's services for the sole purpose of offering her opinions to support his constitutional claims.* The failure of counsel to ensure that Dr. Sultan's opinions were filed in the record is a result of excusable neglect.

(*Id.* at 2) (emphasis added).

In support of his claim that Dr. Sultan's deposition and report were not included in the record because of

mistake, inadvertence, surprise, or excusable neglect, Thompson stated the following:

> District Court counsel for Mr. Thompson, Stephen M. Kissinger, was under the mistaken belief that the evidence was in the record.1 To the extent that counsel should have nonetheless known that Respondent had not placed Dr. Sultan's deposition and report in the record, counsel's failure to ascertain that fact and file the same himself was the result of excusable neglect. During the time period in question, counsel's office was in a state of turmoil and his caseload was excessively burdensome.
>
> As described fully in the attached affidavit of counsel, Stephen M. Kissinger, this state of disorder contributed to counsel's excusably negligent failure to realize that Dr. Sultan's deposition and report were not filed in the record. (Attachment C).
>
> 1. Respondent's deposition of Dr. Crown and the accompanying report were placed in the record by Respondent. (R. 91). Because Respondent had moved for costs incurred in, *inter alia*, hiring its own mental health expert, Dr. Blau, on the grounds that Dr. Blau's services were unnecessary because Petitioner had no expert opinions to support the mental health related allegations contained in the petition, *counsel for Mr. Thompson was under the mistaken belief that Respondent had placed his deposition of Dr. Sultan and the report which Dr. Sultan had supplied to Respondent in the record.*

(*Id.* at 3) (emphasis added). Thompson therefore asked the Court to order the record supplemented with the deposition and report of Dr. Faye E. Sultan, PhD, and that the

district court revisit its previous summary denial of Thompson's petition. (*Id.*)

(i). Dr. Sultan's Report

Attached to the motion are three exhibits. The first is a psychological report prepared by Dr. Sultan, dated July 22, 1999. Dr. Sultan states the referral questions as follows:

> 1. Mr. Thompson's current psychological status[.]
> 2. *Mr. Thompson's likely psychological status and mental state before and surrounding the time of the 1985 offense.*
> 3. Social, environmental, psychological, and economic factors in the life of Mr. Thompson which might have [to] be considered to be mitigating in nature at the time of his trial.

(DCTR 133, Attachment A; emphasis added).

Dr. Sultan's report indicated that she began psychological evaluation of Thompson on August 20, 1998. At the first session, which lasted four hours, Dr. Sultan conducted a clinical interview and administered the MMPI-2. Dr. Sultan also noted that she did not assess Thompson's levels of current intellectual and neuropsychological functioning because they had recently been assessed by Dr. Crown.

Thereafter, Dr. Sultan initiated "a very extensive review of legal, military, medical, prison and psychiatric/psychological records." Regarding "Relevant Psychological/Psychiatric Data Contained in Records," Dr. Sultan stated:

> The [sic] is substantial documentation throughout the Tennessee Department of Corrections records that Mr. Greg Thompson has suffered from significant mental illness since at least the time of his incarceration in 1985. He has been treated almost continuously with some combination of major tranquilizer and/or anti-depressant and/or anti-anxiety medications. He has received a variety of diagnostic labels including Psychosis, Psychosis Not Otherwise Specified, Paranoid Schizophrenia, Mania, Mixed Substance Abuse, Schizophrenia, BiPolar Affective Disorder, Schizoaffective Disorder, Malingering, and Adult Antisocial Behavior. This is clearly indicative of the Tennessee DOC mental health staff's view that Mr. Thompson has experienced major mental illness throughout at least most of his period of incarceration. Further, there is extensive documentation contained in these records of many episodes of bizarre aggressive and/or self destructive behavior.

(*Id.*)

Next, Dr. Sultan stated that she interviewed five individuals "who provided significant supplemental information about the life circumstances and past/present psychological functioning of Mr. Gregory Thompson." Dr. Sultan interviewed Ms. Maybelle Lamar, Thompson's maternal grandmother. Dr. Sultan reported that Lamar assumed complete responsibility for Thompson and his two older siblings after Thompson's mother was killed when Thompson was five years old. Dr. Sultan reported Lamar's description of Thompson as follows:

> Ms. Lamar described Mr. Thompson as displaying significantly "different" behavior when he returned to visit her following his discharge from the U.S. Navy. "Greg didn't act the same".

> Unlike the 'eager to please', passive, sometimes funny gentle boy who she had reared, Mr. Thompson was "angry", "sometimes sad". "I don't think he wanted me to know what was going on with him. He mostly just stayed away from me." Ms. Lamar reported that she noticed Mr. Thompson sometimes "staring off into space" or "talking to himself". She would ask him about these behavior. [sic] "He'd deny it. He acted like he didn't know what I was talking about." Ms. Lamar recalls being quite concerned about her grandson's mental state during this time. She did not recall ever being asked questions at any time before or during Mr. Thompson's trial.

(DCTR 133 Attachment A).

Dr. Sultan also interviewed Ms. Nora Jean Hall Wharton, Thompson's older sister. Dr. Sultan reported:

> Ms. Wharton described Mr. Greg Thompson as a highly sensitive, passive, timid, emotionally vulnerable child. She described a childhood of great hardship. According to her report, their grandmother, Ms. Maybelle Lamar was verbally abusive, neglectful of the children's basic daily needs, highly critical, and unable to care properly for the children. Ms. Wharton described many instances of such abuse and neglect. She described the period following their mother's death as particularly chaotic and neglectful, recalling that often there was no food in the home and that the children would take money from under their grandmother's mattress to go and buy food. In the period following their mother's death, Ms. Wharton reported that her grandmother was continuously drunk and unable to care for her grandchildren. According to Ms. Wharton, Greg

> Thompson frequently witnessed his sister Nora being beaten by their grandmother.
>
> Ms. Wharton further recalled that she and her younger brother had witnessed the brutal beating and rape of their mother by their biological father. She recalls Greg standing in the scene screaming and sobbing uncontrollably.
>
> Of particular relevance is Ms. Wharton's recollections about Mr. Thompson repeatedly banging his head against the wall of their home on many occasions during their early childhood. This behavior frequently followed their grandmother yelling at Greg "You have the Devil in you." Mr. Thompson would tell his sister that he was attempting to "knock the Devil out" of his head in this way. Ms. Wharton recalls believing that this behavior was quite odd.
>
> Ms. Wharton reported that Greg would frequently cry at school during the early school years, and as a result, was often the victim of intense mockery from his classmates. Because Ms. Wharton was in the same classroom as her brother she observed these behaviors and often intervened on her brother's behalf. She described Mr. Thompson's response to this abuse as quite passive.
>
> Following his discharge from military service, Ms. Wharton described Mr. Thompson's behavior as significantly different than his prior conduct and attitude. She reported several episodes of bizarre behavior which included a sudden intense emotional reaction without obvious external provocation. Mr. Thompson would become extremely angry, would cry and scream for a lengthy period of time, would appear as if he

might or actually become physically violent or aggressive, and then would suddenly retreat. Ms. Thompson reported this behavior and her concerns about it to her grandmother. Ms. Lamar suggested that Ms. Wharton take her brother to the psychiatric unit of the local hospital for treatment. Ms. Wharton did not attempt to get any treatment for Mr. Thompson and reports feeling quite guilty about this.

Nora Jean Wharton described her own struggles with mental illness throughout the past fifteen years. She has received counseling to assist her in coping with the effects of her abusive childhood and she has been treated with a combination of a major tranquilizer (Stellazine) and anti-depressant medications. She reported her younger half-sister Kim has also suffered from significant mental illness.

(DCTR 133 Attachment A).

Dr. Sultan also relayed the report of Michael Chavis, an investigator for the Federal Defenders Office of Eastern Tennessee, from his interview of Ms. Cajulao in summer of 1998.

> Mr. Chavis reported that Ms. Cajulao described Mr. Thompson as displaying increasingly bizarre behavior during the latter part of their relationship. Similar to descriptions proved [sic] by Ms. Nora Wharton, Ms. Cajulao reported several episodes of "paranoid" and aggressive behavior which had no apparent external antecedent. She reported that Mr. Thompson sometimes thought that people were "after" him. He would close all the curtains in the house because he did not want the person who was "looking" for him to see him through the curtains. She remembers being

> quite concerned about Mr. Thompson's mental state.

Dr. Sultan next reported her "Summary and Conclusions," which we quote here in full:

> Mr. Gregory Thompson has experienced symptoms of a major mental illness throughout his adult life. Indeed, there is information available which suggests that Mr. Thompson was displaying significant signs of mental illness from the time he was a small child. Self-injurious behavior is reported as early as six years old. There is extensive documentation contained within the records reviewed for this evaluation that Mr. Thompson has experienced a thought disorder and/or an affective disorder of some type for many years.
>
> *It is my opinion that Mr. Gregory Thompson is most appropriately diagnosed, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as having Schizoaffective Disorder, Bipolar Type. As is typical of this illness, symptoms became apparent in early adulthood. Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.*
>
> Further, Mr. Thompson was the victim of severe childhood emotional abuse and physical neglect. His family background is best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There

are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases.

It is important to note that all of the information related to Mr. Thompson's early mental illness and social history was available at the time of his 1985 trial.

Id. (emphases added). Again, this report is dated July 22, 1999.[11]

(ii). Dr. Sultan's Deposition Testimony

The second attachment is Dr. Sultan's deposition. Pruden, counsel for Respondent, took Dr. Sultan's deposition on July 22, 1999. Appearing on behalf of Thompson was Stephen Kissinger. Michael Chavis was also present.

Dr. Sultan told Respondent that she was first contacted by Chavis on behalf of Kissinger in July or August of 1998. Dr. Sultan testified that

A. Mr. Chavis asked me about my availability *and asked if I would be willing to perform a psychological evaluation to assess what Mr. Thompson's psychological condition might have been like at the time of the offense in 1985, to assess whether it was possible to make such an appraisal, to see whether there were factors in his personal background that might have been investigated at the time of trial that would have had bearing on his psychological status at the time of the*

[11] The documents to which Dr. Sultan refers are not actually attached to the report. They are attached to her deposition testimony, Attachment B, and marked as Exhibit 3 to that deposition.

offense, and Mr. Chavis also suggested that they wanted to know something about Mr. Thompson's current psychological state, his level of functioning at the present time.

Q: Were you also asked if you would be able to determine his competency at the time of his criminal trial in 1985?

A: That was not an initial question, no.

. . . .

Q: Did Mr. Chavis express to you any opinion as to what he thought Mr. Thompson's psychological condition was, his mental status was, at the time of the offense?

A: The only opinion that he expressed to me was that he thought that he was not in good shape, that he had deteriorated. He didn't label it in any particular way. Said he didn't think that he was doing as well.

(Emphasis added.) (DCTR 133 Attachment B).

Dr. Sultan also stated that she had consulted with Dr. Crown. She stated that Chavis told her Dr. Crown would be conducting the neuropsychological and intellectual assessment. Dr. Sultan testified that she needed to check Dr. Crown's test results so that she could include them in her opinion, but that she did not provide Dr. Crown with any of her diagnostic information.

When asked whether she had prepared a social history on Thompson, Dr. Sultan indicated that she had not yet but that it had been provided as part of the prison records. Dr. Sultan testified that she had spoken with Thompson's grandmother and sister, and had attempted to

speak with his brother Curtis. She further stated that, although she had not spoken with any of Thompson's school teachers, school administrators, or neighbors, she had reviewed testimony from them. Dr. Sultan was not sure whether she had reviewed the actual transcript from Thompson's court martial, but stated that, at a minimum, she had reviewed the testimony of at least some of the witnesses. She had not contacted any of Thompson's supervisors in the military.

Although Dr. Sultan also had not spoken with Cajulao, she interviewed Chavis, who spent several days with Cajulao in 1998. Dr. Sultan stated that she found Cajulao's observations "beneficial" in reaching her diagnosis. Specifically,

> A: Ms. Cajulao described to Mr. Chavis that during the course of the four-year relationship she had with Mr. Thompson, Mr. Thompson became increasingly bizarre in behavior that he exhibited. There were a number of occasions in which there were incidents that took place in the military that he described to her as him having been attacked. The facts of the situation may in fact not be that, but that was his description to her, that he was being picked on, that he was being bullied, that he was being attacked.
>
> He became depressed, according to her, over time and increasingly paranoid. At some point she would come home from work, and he would be in their home with the curtains drawn, standing by himself in the dark telling her that people were after him and that he didn't want people to be

> able to look at him through the windows. She remembers being quite concerned about his behavior.
>
> There are a couple of situations that she described to Mr. Chavis in which, with no external provocation that she could identify, Mr. Thompson became quite violent with her, and she saw those behaviors as very unusual for him and reported to Mr. Chavis that Mr. Thompson seemed unaware of what had provoked it and didn't even seem after the fact to remember what had taken place, would simply, after a period of time, calm himself down and return to normal behavior. I found all of that quite significant.

(*Id.* at 55-56).

Shortly thereafter, Pruden called for a break, and took that opportunity to take a look at Dr. Sultan's report. Upon return, Pruden asked Dr. Sultan:

> Q: What indicates to you or what indicia are there for you that suggest Mr. Thompson was displaying significant signs of mental illness from the time he was a small child? How do you arrive at that conclusion?
>
> A: During my interview with Mr. Thompson's sister – and let me say all of her names – Ms. Nora Jean Hall Wharton, Ms. Wharton spontaneously began to talk to me about Mr. Thompson's behavior in the time period immediately following their mother's death.
>
> By the time of the first grade, Mr. Thompson, when he was being yelled at by his grandmother, she was reportedly verbally

abusive in the following fashion: She would yell at him – you have the devil in you, boy. She would then observe Mr. Thompson standing or sitting beside a wall repeatedly banging his head into the wall. She, in her role as protector of him, would ask him what was going on, and he would tell her he was trying to knock the devil out of his head. She recalls at the time, although she was quite young herself, being worried about his behavior and thinking it as was very odd.

One of things that we know about people who develop thought disorders is that frequently in childhood you'll see one or more peculiarities in behavior. This would certainly fit in that category. She recalls other instances.

Q: Sort of self-punishment or a self-exorcism type thing?

A: A self-injurious behavior is what we would call it I think. Mr. Thompson, when he was Greg, in the first and second and third grade had rather frequent crying episodes in classrooms that Ms. Wharton recalls also as very unusual in the context of his schoolroom situation. She describes him as being the subject of torment on the part of the students because he behaved in an odd fashion. Sometimes he would simply begin to cry and wail and scream and apparently made a sound like a fire engine when he was sobbing and developed the nickname Fire Engine. That's reported in the trial transcript.

She told me much more detail about actually the extent of those kind of emotional outbursts.

At home it was rather common for Mr. Thompson to begin to cry and scream during times when Ms. Wharton herself was being beaten by their grandmother. Ms. Wharton was the victim of physical abuse on the part of the grandmother. Mr. Thompson observed much of this since they were together virtually all of the time, and Nora Wharton was not really permitted much interaction outside of their home.

(*Id.* at 60).

Dr. Sultan further testified that:

She [Ms. Wharton] recalled another episode during which her biological father was brutally beating and raping their mother on the floor in front of them when the children were quite small, perhaps Mr. Thompson was himself three or four. She was maybe four or five. Mr. Thompson's reaction to that was to stand and scream and scream and scream and scream during the entire episode. Any of the – taking the self-injury aside, setting that aside, any one of those behaviors in isolation might not be particularly significant. Putting them together, we begin to see a pattern of intense emotional reactivity.

Q: So basically, if I understand it, it's the self-injurious behavior and the crying and the way you see him reacting to these physical abuses of others?

A: Yes.

Q: And that is indicative of a sign of mental illness to you? I just want to make sure that I'm understanding what you're telling me. If I'm not, please explain it to me.

A: I think I understand your question. It is an early indicator of a problem that's likely to develop. With the benefit of hindsight, it takes on the significance of a precursor, because then we see the escalating pattern of dysfunction and abnormality.

Q: Sort of a causal relationship is what you're seeing developing?

A: I'm not sure what causes what. There are often early indices of later mental illnesses that you don't know exactly what it's going to look like later, but you realize in looking at the child that there's a high likelihood that something is not going to be right when that person achieves maturity.

Q: Because of the environment, for example, in which he's growing up?

A: Perhaps. Perhaps because of the genetics involved. Perhaps because of the situations he's exposed to, as you said, the environment. Perhaps because of whatever factors there are. Perhaps nutrition plays a role in this. These children were without food for significant periods of time as well. I don't know all of the reasons, but what I know is that if you look back in the childhood of this man, the beginnings of mental illness are apparent.

Q: Besides Ms. Wharton's report of lack of food, have you seen any evidence that the children were taken away because of malnutrition?

A: No. Ms. Wharton did tell me, however, that there was a neighbor who had planned to make a report to Social Services, so perhaps I'll have the opportunity to interview that neighbor as well.

Q: . . . You don't know to what degree the children were malnourished then?

A: No. I don't know. I do know that – and this is confirmed by the grandmother – in the six weeks approximately following their mother's death, the children were left alone virtually all of the time because Ms. Lamar was drunk and in bed, and so we have a five, a six, and a seven-year-old child in a house with no food. They would occasionally steal money from underneath her mattress while she was sleeping, and one of them would go to the store to try to find some food. Occasionally a neighbor would provide them with a meal or a can of food. I don't know whether they were malnourished over an extended period of time. I do know that there is, from Ms. Wharton's perspective, rather serious psychological damage from that time.

Q: You have no medical documentation showing any malnourished condition or that it's caused some problem with his brain, do you?

A: I don't. These children were never taken to the doctor, so there wouldn't be any medical

documentation. There's probably documentation in the school system. According to Ms. Wharton, Ms. Lamar was so drunk at the beginning of the school year following their mother's death that she forgot to sign the children up for lunches at school. They didn't have anything to eat during the day, so they forged her signature on a permission slip so that they could eat. They were discovered and punished by the school superintendent people, and a form was sent home to Ms. Lamar. She then signed it, and the children were able to eat lunch after that point. A couple weeks passed for all of that to get straightened out.

Ms. Wharton has undergone a lot of therapy in recent years and says that she's now able to describe situations that she wasn't very comfortable acknowledging to herself, these being one of them.

Q: Your diagnosis of Mr. Thompson is schizoaffective disorder, comma, bipolar type. What leads you to that diagnosis from what you've reviewed and your testing results?

A: What leads me to the diagnosis is that there is a long history, perhaps at this point almost a 20-year history, of simultaneous thought disorder on the part of Mr. Thompson documented throughout all the records, and affective disorder, emotional disorder, being unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is

manifested in persecutory ideas, delusions of grandeur – lots of different kinds of delusions actually – auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination.

The psychological testing early on in Mr. Thompson's incarceration confirm the presence of a psychotic process. There was an MMPI administered to him by a prison psychologist in 1990 that is described as valid and indicative of psychotic process, and throughout the prison record he receives a variety of diagnoses that take into account both thought disorder and affective illness.

The very best diagnosis to describe all of the complex of symptoms that I just talked to you about is schizoaffective disorder, bipolar type.

Q: You note in your report Mr. Thompson was observed having a significant change in behavior after he was discharged from the Navy. What significance do you attach to that fact?

A: Well, it's interesting, because the state Court of Appeals actually notes this, that prior to his entry into the military Mr. Thompson is described almost uniformly – well, in fact, uniformly according to their opinion – as passive, as compliant, as eager to please, as gentle, as timid, as eager to run from attacks.

At some point – and we don't know, because I haven't seen any psychiatric records from the military at this point; I don't know if

there are any – we don't know whether or not the change in Mr. Thompson is perceived as other than behavioral disruption, but, in fact, his description of that time is that he began to notice that people were trying to hurt him all the time, that officers and other people of his rank and slightly above his rank attempted to provoke him, that they sometimes physically assaulted him, that he thought he was being followed a lot, and that he sometimes struck out in what he thought was defense and then later found out from other people who he knew and trusted that there wasn't anything to defend against or that there might not have been anything to defend against.

Q: This is what he related to you during your interview last August?

A: Right. The people who saw him after the military each were struck by how very different he seemed. That was the word that kept being used, "different." Sometimes the people I was speaking to were not able to describe what different meant, but, for example, the grandmother said that he was different as in not right, that he wasn't himself. Ms. Wharton tells me that the grandmother was very well aware that he was in deep psychological distress, and, in fact, the grandmother suggested that he be taken to the psychiatric unit at Grady Hospital in Atlanta, I believe, for treatment. The grandmother observed him staring off into space for long periods of time. She observed him mumbling to himself. When she asked him what he was doing, he told her he had no idea what she was talking about. She said

that was very different from the boy who left her to go into service.

The sister has even a better glimpse of him than that, because he actually went to live with her for a while, and she said he was bizarre. She described him as paranoid. She said that he would explode for no reason at all, that she was afraid of him for the very first time in her life, that they had always been terribly close, the sort of close where if there was only one piece of bread to eat they would share it, that they always looked out for one another, and that suddenly he was behaving in ways that she simply could not identify. She described three very serious episodes of aggression and emotional upset that she said are what led her to approach her grandmother about what to do for treatment for him.

(*Id.* at 62).

Pruden then asked:

Q: You state that the schizoaffective disorder, bipolar type, would substantially impair Mr. Thompson's ability to conform his conduct to the requirements of the law. How so?

A: There are points in time when Mr. Thompson is out of contact with reality. He is responding to situations that simply don't exist or that he perceives in extremely exaggerated or different form. A person is not able to conform one's conduct to the law if you are frankly delusional or hallucinating in some way. Mr. Thompson over the years has had both of those symptoms.

Q: So it's this delusional aspect of this disorder that is the main factor that would keep him from having the ability to conform his conduct to the requirements of law, if I understand you correctly?

A: Is it the main factor? Let me say that I think it's at least as potent a factor if not more as the other aspect of his mental illness, which is that he has emotional disregulation.

Q: Meaning?

A: Meaning Mr. Thompson often is not in control of his emotions. He has episodes of rage, of aggression, that he doesn't understand or relate to very well. He's told about them later. Sometimes he remembers them, sometimes he doesn't.

(*Id.* at 69).

The deposition concluded shortly thereafter.

(iii). Kissinger's Affidavit

The third attachment is Kissinger's affidavit. In it, he explains in relevant part the following:

> 2. I was appointed to represent the Appellant, Gregory Thompson, on January 29, 1998, by the district court.
>
> 3. In approximately November of 1999, Ms. Leah Prewitt, the Federal Defender for the Eastern District of Tennessee, was forced by illness to cease activities on behalf of Federal Defender Services of Eastern Tennessee, Inc. Ms. Prewitt's duties were assumed by Ms. Elizabeth Ford, an

> Assistant Federal Defender in the office. Because Ms. Prewitt had not resigned, Federal Defender Services of Eastern Tennessee, Inc., was not able to hire a permanent replacement for Ms. Prewitt. Because Ms. Ford could not do both Ms. Prewitt's job and her own, Federal Defender Services of Eastern Tennessee, Inc. assigned a portion of Ms. Ford's caseload to affiant.
>
> 4. Affiant, however, already had an extremely heavy capital habeas corpus caseload, including, but not limited to, Mr. Thompson's case. In fact, his capital caseload was so heavy that Federal Defender Services of Eastern Tennessee, Inc. was forced to hire a second attorney to handle capital habeas corpus cases in July of 2000. When a portion of Ms. Ford's cases were assigned to affiant, that caseload became so great that affiant made errors which, however understandable, were nonetheless errors.
>
> 5. *Despite the affiant's efforts, there were occasions when he made assumptions, such as the assumption he made regarding Respondent's filing of the report and deposition of Dr. Sultan, which were, however reasonable, incorrect. Counsel's failure to verify this assumption regarding these documents was neglect. Given the extraordinary pressure under which counsel was operating at that time, such neglect was excusable.*
>
> And further this affiant saith not.

(*Id.* Attachment C) (emphasis added). Kissinger's affidavit is dated March 1, 2001.

g. The District Court's Ruling on the Rule 60(b) Motion

On April 17, 2001, the district court denied Thompson's motion to reconsider the order denying his motion to alter or amend judgment pursuant to Fed. R. Civ. P. 60(b). First, the district court held that it had previously determined the Rule 60(b) motion was filed outside the one year time period. The district court noted that, according to its calculation the motion was required to be filed no later than February 16, 2001, to be considered timely. DCTR 139 (citing Fed. R. Civ. P. 6 and 60(b)). The district court then noted that:

> Thompson now argues, without citing authority, that the calculation of the Rule 60(b) one-year limitation period should not begin until March 31, 2000, the date this Court denied his Rule 59 motion to alter or amend the judgment. Thompson's interpretation is contrary to the plain language of the rule. Thompson has not cited, nor has the Court found, any authority to support his position. The rule specifies that the motion should be made within a reasonable time, and in this case "not more than one year after the judgment, order, or proceeding was entered or taken." Rule 60(b) of the Federal Rules of Civil Procedure. In the case before this Court, the order dismissing the *habeas* petition was entered on February 17, 2000. [Court File No. 125].

(*Id.* at 3).

Next, the district court stated, and we quote in full, the following:

> Moreover, the Court specifically noted in its memorandum opinion dismissing the *habeas* petition, that Thompson procedurally defaulted his claim that he was incompetent at the time of the crime and an [sic] the time of trial. [Court File No. 124, at 35]. ***Furthermore, when addressing Thompson's claim of ineffective assistance of counsel for failing to adequately investigate his mental health, the Court placed Thompson on notice that he failed to provide evidence of his allegations that he was incompetent at the time of the crime and trial.*** [Court File No. 124, at 53].
>
> > Petitioner claims experts recently obtained by him have revealed that he was incompetent under Tennessee law at the time of the crime and throughout his court proceedings. Petitioner has failed to state the name of the expert and failed to provide proof of these revelations. The Court has read the deposition of Dr. Crown, (Court File No. 119, Exhibit 1) but was unable to located [sic] his opinion that Thompson was incompetent at the time of the crime and throughout his court proceedings. As a matter of fact, Dr. Crown stated he was not asked to render any determination about whether or not Thompson was competent during his state trial.
>
> *Id.* Thus, the filing of this request more than one year after Thompson was placed on notice that such information was not in the record is unreasonable and not excusable neglect.

(*Id.* at 3-4) (bold and underlining added).

2. Appeal to this Court

Thompson did not appeal from the order of the district court's denying his motion to alter or amend judgment. On appeal to this Court, Thompson articulated the issues for review as follows:

> I. Whether the district court erred when it reviewed Mr. Thompson's claims under the "all reasonable jurists" standard denounced by the Supreme Court in (*Terry*) *Williams v. Taylor* to summarily deny Mr. Thompson's petition.
>
> II. Whether the district court erred in denying Mr. Thompson's habeas petition without a hearing where Mr. Thompson did not fail to develop the factual basis of his claims in state court and whether the district court erred by making factual findings without affording Mr. Thompson the opportunity to present evidence with regards to those findings.
>
> III. Whether Mr. Thompson received ineffective assistance of counsel in both the guilt and sentencing phases of his capital trial where counsel failed to investigate and present evidence regarding Mr. Thompson's mental illness and social history and failed to present evidence in support of a life sentence in violation of due process and the Sixth Amendment.
>
> IV. Whether Mr. Thompson's Fifth, Sixth, Eight, and Fourteenth Amendment rights were violated when the state withheld exculpatory evidence which clearly supported Mr. Thompson's claim of serious mental

> illness and its debilitating effects and presented false evidence regarding Mr. Thompson's mental health during trial and post-conviction proceedings.

Curiously, appellate habeas counsel Dana Hansen did not appeal the denial of the Rule 60(b) motion, despite her apparent realization that Dr. Sultan's deposition testimony and report were never made part of the district court record.

III. Discussion

A. Procedural Posture

This case is governed by the Anterrorism and Effective Death Penalty Act of 1996, and we have already ruled on the initial habeas petition. *See Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 804 (2003). However, as alluded to above, this matter is before us in a unique procedural posture, on our own motion, and prior to the issuance of the mandate.[12] Thus, we are not obliged to satisfy the requirements for the filing of a second or successive petition outlined in 28 U.S.C. § 2244. *See Workman v. Bell*, 227 F.3d 331, 334 (6th Cir. 2000) (en banc; equally divided court) (stating that "[a]s a general

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[12] On July 26, 2002, Respondent-Appellee, Ricky Bell, filed a motion for reconsideration of our order filed July 26, 2002, granting Petitioner's *ex parte* motion for authorization to expand the appointment of counsel to include state court proceedings. That motion has not yet been ruled on.

Furthermore, our docket sheet reflects that, on March 14, 2003, Dana C. Hansen filed a motion to stay the mandate, and that we granted it on March 24, 2003. On December 2, 2003, Dana Hansen filed a motion to further stay the mandate, which this Court granted on December 12, 2003.

rule, when a mandate is recalled with respect to a petition for writ of habeas corpus, the petitioner first must satisfy the requirements for the filing of a second or successive petition as outlined in § 2244(b)").

However, even if this matter were before us as a second habeas petition, it would not matter, because the AEDPA does not bar a second or successive petition premised upon fraud upon the court. *See Workman v. Bell,* 245 F.3d 849, 852 (6th Cir. 2001) ("In our equally divided opinion denying further relief for the petitioner . . . , all of the judges agreed that the court can reconsider the petition if there was a fraud upon the court.") *Cf. Calderon v. Thompson,* 523 U.S. 538, 556-57 (1998) (holding that the principles of the AEDPA apply in general to a recall of the mandate because a "State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief;" exempting claims of "fraud upon the court, calling into question the very legitimacy of the judgment"); *Workman,* 227 F.3d at 334 (stating that "[o]ne of the reasons which would justify recalling a mandate is the potential existence of a fraud upon the court"). Indeed, in *Calderon,* the Supreme Court stated that "a mandate may be recalled when it is necessary to address new circumstances before the court which are 'grave' and 'unforeseen' or which are, in other words, unforeseeable circumstances which implicate the justice of the judgment previously rendered." *Workman,* 227 F.3d at 334 n. 3 (citing *Calderon,* 523 U.S. at 549).

B. Ineffective Assistance of Trial Counsel at Mitigation

As the United States Supreme Court recognized in *Strickland,* "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington,* 466 U.S. 668, 684 (1984). "'[T]he right to counsel is the right to effective assistance of counsel,'" *id.* (quoting *McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970)), and a defendant can be deprived of that right by counsel's failure to render "'adequate legal assistance.'" *Id.* (quoting *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980)).

In *Strickland,* the Supreme Court held that

> [a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

When the duty at issue is the duty to investigate, "counsel has a duty to make reasonable investigations, or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690; *see also id.* at 688-89. Reasonableness is determined by considering all of the circumstances. *Id.* at 688. However "[p]revailing norms of

practice as reflected in American Bar Association standards and the like," are guides to determining reasonableness. *Id.; see also Hamblin v. Mitchell,* 354 F.3d 482, 486-88 (6th Cir. 2003) (same).

Also relevant to the question of whether the scope of counsel's investigation was reasonable is what counsel *actually* knew. "In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 2538 (2003).

1. Deficient Performance

In our previous opinion we held that trial counsels' investigation was sufficient, principally because Thompson failed to present any evidence indicated that he suffered from symptoms of mental illness at the time of the offense. *See Thompson,* 315 F.3d at 589. In other words, we could not have found ineffective assistance because there was no showing that trial counsel missed available evidence, and we were mislead by incomplete records.

According to Dr. Sultan's July 1999 testimony, Thompson was suffering from a serious mental illness at the time of the offense.[13] Moreover, "all of the information

[13] Schizophrenia is a chronic disorder of thought, characterized by delusions, hallucinations, disorganized speech or grossly disorganized orientation or catatonic behaviors. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders pp. (rev. 4th ed. 2000) ("DSM-IV"). There is no definite laboratory or radiological test that establishes the diagnosis of schizophrenia, rather, the diagnosis is based on longitudinal historical information. As individuals

(Continued on following page)

related to Mr. Thompson's early mental illness and social history [and] was available at the time of his 1985 trial." Had trial counsel adequately interviewed family members, counsel would have found that Thompson exhibited troubling behaviors from an early age. Thompson engaged in self-injurious behaviors as a young child. As a young adult, and prior to the murder, Thompson had mood swings and episodes during which he acted in a bizarre manner and appeared to lose contact with reality. He talked to himself. At times he became agitated, crying and screaming for no apparent reason. At other times, he appeared paranoid, keeping the drapes closed, fearing that he was being followed. As Dr. Sultan observed, although each instance taken alone might not be sufficient, when combined with Thompson's abnormal responses, they are indicative of an early psychopathology.

As Dr. Blair indicated at the state post-conviction hearing, a complete social and family history is critical to the establishment of a diagnosis of mental illness. *See Thompson,* 315 F.3d at 579. Yet, according to Dr. Blair, MTMHI's records only contained sketchy information related to Thompson's history before he committed the murder. Dr. Copple's testimony indicated that he did not take a thorough history: "I did get a little bit of general information, such as his age, his education." Dr. Copple did not appear to be aware of Thompson's possible symptoms. When asked about Thompson's report of mood

with schizophrenia may not disclose the full extent of their symptoms, an evaluation for the presence or absence of schizophrenia or other psychotic disorders is not complete without a thorough social history obtained from family members or friends who have known the patient over time.

swings, Copple indicated that he did not believe Thompson ever had mood swings or reported them to Dr. Watson.

This readily available social and family history evidence, had trial counsel obtained it, should have been reported to experts for psychiatric evaluation. After all, it was counsel who traveled to Thompson's home town to interview family members and friends and would have had access to the information. Furthermore, the evidence was not subtle, counsel did not need any expertise in psychiatry, as even Thompson's family members were aware of Thompson's need for a psychiatric evaluation.

Trial counsel were also ineffective for failing to obtain and present a comprehensive social history. Thompson was the victim of verbal abuse and neglect of sufficient severity that by first grade Thompson was exhibiting odd behaviors. He repeatedly banged his head in response to his grandmother yelling at him. He wailed in the classroom and received the nickname of "Fire Engine" due to the unusual sound of his sobs. At age three or four, he observed his father brutally beat and rape his mother. His mother died when he was five years old and he was left with his maternal grandmother who was continuously drunk for the first six weeks and did not even provide food for the children. All of this information was powerful mitigating evidence that should have been presented to the trier of fact at sentencing. *See Wiggins v. Smith,* 539 U.S. 510 (2003) (holding that the scope of trial counsel's investigation was unreasonable when counsel failed to investigate the petitioner's social history, including the fact that his mother was a chronic alcoholic and that he was sent to various foster homes, factors which would have led any reasonably competent attorney to pursue); *Williams v. Taylor,* 529 U.S. 362, 395-98 (2000) (finding

ineffective assistance of counsel because counsel failed to investigate and introduce readily available evidence of the petitioner's nightmarish childhood, including severe and repeated beatings by his father, and available evidence showing that the petitioner was borderline mentally retarded; also finding prejudice in that the evidence "might well have influenced the jury's appraisal of his moral culpability"); *Hamblin,* 354 F.3d at 489-91 (holding that defense counsel's representation of the petitioner fell short of prevailing standards because had counsel investigated, they would have found a large body of mitigating evidence of an unstable and deprived childhood, characterized by extreme poverty, neglect, and family violence, as well as signs of a mental disability or disorder); *Coleman v. Mitchell,* 268 F.3d 417, 451-54 (6th Cir. 2001) (finding ineffective assistance at mitigation where counsel failed to present evidence of the petitioner's horrific childhood, his mental and emotional disorders, and low IQ); *Carter v. Bell,* 218 F.3d 581, 600 (6th Cir. 2000) (finding ineffective assistance where counsel failed to present evidence "of a childhood in which abuse, neglect and hunger were normal").

Like trial counsel in *Wiggins,* trial counsel here had more than sufficient leads to investigate further. *Cf. Wiggins,* 123 S. Ct. at 2536-37 (holding that trial counsel's decision not to expand their investigation beyond a presentence investigation report and department of social services records which revealed facts concerning the petitioner's alcoholic mother and his problems in foster care, as well as his self-report of a miserable childhood was unreasonable). Thompson's trial counsel were aware that Thompson had exhibited possible symptoms of a mental illness. Trial counsel filed a notice of insanity

defense and requested that Thompson undergo a mental evaluation. In a letter dated March 29, 1985 to Dr. Taran of Multi-County Mental Health, counsel explained that Thompson was experiencing "extreme mood changes." Counsel also knew of Thompson's violent behaviors in the military, which were in stark contrast to Thompson's previous history. In addition, as described in the report, Thompson described hearing auditory hallucinations "all of his life" when admitted to MTMHI. As counsel testified at the post-conviction evidentiary hearing, "[t]he thing that struck me so strongly throughout this whole case was really to do with that, and that was the difference in the man when he lived in Georgia and grew up there and what kind of person he was as opposed to someone who committed – allegedly committed this act, this murder and that was a tip off that there may have been some kind of brain injury." *Thompson*, 315 F.3d at 577. In short, trial counsel's investigation into Thompson's background did not reflect reasonable professional judgment in light of what they knew and suspected. *Cf. Wiggins*, 123 S. Ct. at 2542 (holding that trial counsel's decision to end their investigation when they did was unreasonable in light of the evidence counsel uncovered in the social service records).

2. Prejudice

The failure to present this mitigating evidence was prejudicial. *Cf. Wiggins*, 123 S. Ct. at 2542 (holding that the petitioner's evidence of severe privation and abuse in his early life while in the custody of his alcoholic mother and physical abuse in subsequent years in foster care prejudiced his defense). As the Supreme Court stated in *Wiggins*, "Petitioner thus had the kind of troubled history we have declared relevant to assessing a defendant's moral

culpability." *Id.* at 2542 (and cases cited therein). Finally, as was true in *Wiggins*, "[h]ad the jury been able to place the petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 2543.

In sum, trial counsels' conduct failed to render effective assistance of counsel guaranteed by the Sixth Amendment by failing to conduct a reasonable investigation of Thompson's social history and present powerful, readily available mitigating evidence, and by failing to pursue known leads that might have helped them to prepare their case in mitigation. In light of Dr. Blair's post-conviction testimony that a full history was needed to determine whether Thompson was schizophrenic at the time of the offense, the state court postconviction courts' denial of funds amounted to an objectively unreasonable application of *Strickland* under 28 U.S.C. § 2254(d)(1).

C. Misconduct of Habeas Counsel

The next issue is whether Kissinger may have intentionally, or at a minimum recklessly, failed to timely and properly present critical evidence to the district court and this Court – evidence which, in the words of the district court, might have entitled Thompson to relief. Simply put, the question is this: how and why did habeas counsel fail to timely and properly present Dr. Sultan's expert opinion testimony that "Mr. Thompson was suffering serious mental illness [Schizoaffective Disorder, Bipolar Type] at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform

his conduct to the requirements of law." Psychological Report prepared by Dr. Faye Sultan, dated July 22, 1999.

This matter is somewhat reminiscent of *Demjanjuk v. Petrovsky,* 10 F.3d 338 (6th Cir. 1993).[14] There, on its own motion, this Court vacated the judgment of the district court denying the petitioner's writ of habeas corpus upon finding that the judgments in the underlying extradition proceedings were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court.[15] *Id.* at 356. As in *Demjanjuk,* we must decide if "the conduct outlined herein constitutes fraud on the court or attorney misconduct sufficiently serious to require corrective action on our part." *Id.* at 352.

As we observed in *Demjanjuk,* fraud upon the court "is a somewhat nebulous concept," defined as embracing

> only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct.

[14] Although *Demjanjuk* involved misconduct by federal prosecutors, I see no reason why defense attorneys should not be held to a similar standard of integrity, especially when defense counsel are federal defenders specializing in habeas and capital cases.

[15] Specifically, we found that attorneys for the Department of Justice Attorneys "acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly" when they withheld exculpatory materials from the petitioner. *Demjanjuk v. Petrovsky,* 10 F.3d 338, 354 (6th Cir. 1993).

Id. (quoting 7 *Moore's Federal Practice and Procedure,* ¶ 60.33). *See also Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238, 245 (1944) (holding that fraud upon the court generally involves a deliberately planned scheme to subvert the integrity of the judicial process). Cases dealing with fraud on the court usually turn on whether the improper actions involved the parties alone, or whether the attorneys in the case were also involved. *Demjanjuk,* 10 F.3d at 352. As we further observed in *Demjanjuk,* "[a]s an officer of the court, every attorney has a duty to be completely honest in conducting litigation," and that

> while an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates fraud upon a court.

Id. at 352 (quoting 7 James Wm. et al., Moore's Federal Practice ¶ 60.33). Finally, we remarked that "[a]lthough there are cases holding that a 'plan or scheme' must exist in order to find fraud on the court, we agree . . . that a scheme, based on a subjective intent to commit fraud, is not required in a case such as this. Reckless disregard for the truth is sufficient." *Id.* at 352-53 (holding that Department of Justice Attorneys committed fraud on the court by failing to disclose to the courts and to the detainee exculpatory information in their possession).

Demjanjuk defined fraud on the court as consisting of (1) conduct by an officer of the court, (2) directed towards the judicial machinery itself, that is (3) intentionally false,

wilfully blind to the truth or is in reckless disregard for the truth, is (4) a positive averment or concealment when one is under a duty to disclose, and that (5) deceives the court. *Id.* at 348.

The first and second fraud on the court factors appear to be easily met. Thompson's attorneys are clearly officers of the court, *see generally Hickman v. Taylor,* 329 U.S. 495, 510 (1947) (noting that "[h]istorically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients"), and their representation of Thompson in these habeas proceedings was and is clearly directed at the judicial machinery of the court.

The fourth and fifth factors also appear to be present. Habeas counsel for Thompson had an obligation, as part of their duty to represent zealously their client, to present to the court material, critical, *available* evidence, which in this case would virtually have ensured the relief Thompson requested in his federal habeas corpus petition. This meant presenting, by affidavits or otherwise, proof of Thompson's mental illness at the time of the offense in response to Respondent's motion for summary judgment. *See* Fed. R. Civ. P. 56(e) (stating that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party"). *See also* Fed. R. Civ. P. 56(c) (stating that "[t]he judgment sought shall be rendered forthwith if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law"). If counsel knew that it had positive, mitigating proof in the form of an expert opinion that Thompson suffered from a mental illness at the time of the offense such that it would have substantially impaired his ability to conform his conduct to the requirements of the law – information that the district court specifically indicated in its discovery order might entitle Thompson to the relief he requested – then that information should have been presented in response to Respondent's motion for summary judgment so as to prevent the grant of summary judgment in Respondent's favor and against Thompson.

Here, both the district court and this Court were deceived. That is, both courts assumed that probative evidence as to Thompson's mental illness at the time of the crime did not exist because counsel failed to present it.[16] Based on the natural assumption that such evidence did not exist because it was not presented at the summary judgment stage, the district court held that

> Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute. . . . Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime and at the time of his jury trial. Nor has Thompson provided this Court

[16] This seems to be a pretty natural assumption, given counsel's obligation to zealously represent their client.

> with any significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence.
>
> Petitioner had two different psychological evaluations and both resulted in findings of competency at the time of the crime and at the time of trial.

Memorandum Opinion dated February 17, 2000, at 54-55.

This Court labored under the same misimpression that there was no evidence to establish that Thompson suffered from a serious mental disease or defect at the time of the offense:

> Moreover, not one of Thompson's post-trial experts have opined that Thompson suffered from organicity or mental illness at the time of the crime or trial. Blair, Thompson's state post-conviction expert, also a clinical psychologist with ties to Vanderbilt, declined to give an opinion, stating simply that more information was needed. Significantly, she did not fault the testing procedures used by MTMHI or Copple, but merely stated that they were not extensive enough. Indeed, she performed many of the same tests. *Similarly, neither Crown nor Sultan ever expressed an opinion that Thompson was mentally ill at the time of the crime. In fact, Crown stated that he was not asked to render such an opinion. . . . On the other hand, Crown found Thompson competent in June 1998, which is consistent with Copple's findings and the MTMHI evaluation in 1985.*

> *Also, as the district court found, Thompson failed to submit any medical records or proof* ***to any court*** *that he actually sustained the alleged head injuries or that they resulted in any permanent damage. Further, he has never submitted* ***to any court*** *any proof that he suffered from severe mental illness at the time of the crime.*

Thompson, 315 F.3d at 589-90 (emphases added). That is not all we said:

> Counsel has now had numerous opportunities via expert testimony to establish that Thompson suffered from organic brain disease or mental illness at the time of the crime. *And yet, at each opportunity, counsel fails to secure an answer to the critical issue of whether Thompson was mentally ill at the time of the crime.* In essence, counsel is attempting to rely on, *as proof*, two inferences: 1) because Thompson allegedly suffered head injuries, he must have suffered brain damage, and 2) because he is currently suffering from schizo-affective disorder, he must have been suffering from mental illness at the time of the crime. But inferences are not proof, as even Thompson's experts seem to recognize, for each and every one fails to automatically take the leap from these inferences to the conclusion that he was mentally incompetent at the time of the murder. *However, absent some evidence of organic brain damage or mental illness at the time of the crime, trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist.* As we held in *Lorraine v. Coyle*, 291 F.3d 416, 436 (6th Cir. 2002), "[i]t simply cannot be said that trial counsel's conduct

> fell below an objective standard of reasonableness under *Strickland* simply because the leads [of possible brain damage] led nowhere."
>
> . . . .
>
> Thompson has not presented any evidence of incompetence at the time of the crime or trial in either the state or federal proceedings. As previously noted, none of Thompson's experts have stepped up to the plate on the key issue of Thompson's competence at the time of trial.

Id. at 590-92 (emphases added).

In short, both the district court and this Court were mislead into believing that significant mitigating evidence of Thompson's mental illness at the time of offense did not exist. It quite clearly did exist, *and that evidence was in habeas counsel's possession,* via Dr. Sultan's July 22, 1999 report and July 22, 1999, deposition, prior to the filing of Thompson's response in opposition to Respondent's motion for summary judgment, which Thompson filed on July 29, 1999 (DCTR 86), and prior to Thompson's filing of Supplemental Brief in Support of Response in Opposition to Respondent's Motion for Summary Judgment, on September 14, 1999.[17] (DCTR 104).

This leaves the third factor. Here the question is whether habeas counsel's conduct in failing to present

[17] In his opposition to Respondent's motion for summary judgment, Thompson asked the court for an order allowing him to file a brief in regard to the issues of exhaustion of state remedies. The district court granted Thompson's request via written order on September 8, 1999, directing Thompson to file his brief no later that Tuesday, September 14, 1999.

available evidence of Thompson's mental illness at the time of the crime was intentionally false, wilfully blind to truth, or in reckless disregard for the truth. In his affidavit attached to Thompson's Rule 60(b) motion, Kissinger states that "an extremely heavy capital habeas corpus caseload, including, but not limited to, Mr. Thompson's case" caused him to make "errors," thereby suggesting that his conduct in this matter was negligent and not intentional or in reckless disregard for the truth.

Our incredulity over this explanation stems from a simple premise: how could counsel possibly forget or overlook *the* critical piece of evidence – i.e., an expert opinion that Thompson suffered from a significant mental disease or defect at the time of the offense – that both trial and habeas counsel purportedly sought for over a decade in both the state and federal courts, and which habeas counsel obtained at the very latest (but obviously much sooner) seven days prior to the filing of Thompson's response to Respondent's dispositive motion?

Virtually *every pleading* in both the state and federal proceedings is directed toward this end. Within two months of the murder, trial counsel requested a mental evaluation of Thompson to determine his mental capacity at the time of the crime. Within three months of the murder, trial counsel filed a supplementary motion for a psychiatric examination and a neurological examination to determine if Thompson was suffering from a mental illness on the date of the offense. Less than three months after the offense, Thompson was referred to the Multi-County Mental Health Center for a forensic evaluation to make that determination, and a week later the trial court entered another order directing Thompson to undergo a forensic evaluation at MTMHI.

Trial counsel were not content with the state's evaluation and requested funds to hire an independent psychiatrist. They ultimately hired Dr. Copple. Dr. Copple examined Thompson principally to see what he would be capable of doing in a prison setting and did not perform a thorough review of Thompson' social history. Amazingly, habeas counsel faulted trial counsel's choice of Copple because he did not conduct a thorough review of Thompson's family history and medical background.

In his petition for post-conviction relief in state court, Thompson claimed that trial counsel failed to adequately investigate his background for the existence of mitigating evidence, and sought to hire a licensed psychologist or psychiatrist and an investigator. Attached to that request was the affidavit of Dr. Gillian Blair, a clinical psychologist, who specifically stated that if Thompson were suffering from a neurological or psychological impairment bipolar affective disorder or schizoaffective disorder, it was likely that some degree of that impairment would have existed at the time of the offense and would have been a significant factor in determining whether Thompson could have conformed his conduct to the requirements of law. Dr. Blair stated that Thompson needed a full psychological evaluation. She testified to the same effect at the state post-conviction hearing. The state post-conviction court denied Thompson funds, however.

On appeal to this Court, habeas counsel asserted that the state post-conviction courts placed Thompson in a Catch-22 situation by denying them the funds needed to obtain the requisite expert opinion and then finding no ineffective assistance because there was no proof in the record that counsel failed to present any available evidence of a mental disease or defect. And habeas counsel

went out and hired a neuropsychologist and a clinical psychologist. Dr. Sultan conducted the very examination and evaluation that Dr. Blair outlined was necessary but could not provide because of lack of funds. Dr. Blair stated that "the most important thing that would be necessary would be a full history and full medical records of Mr. Thompson prior to the commission of the offense." She further indicated that from her limited review, Thompson's social history, his childhood and upbringing were "sketchy."

Dr. Sultan found the "other facts" Dr. Blair indicated would be necessary to develop an opinion as to Thompson's condition at the time of the offense. In her report, Dr. Sultan stated that she "initiated a very extensive review of legal, military, medical, prison, and psychiatric/psychological records." Dr. Sultan also interviewed several individuals who provided significant information about Thompson's childhood and family background, including Thompson's grandmother, older sister, and a girlfriend. These witnesses revealed an abusive, traumatic childhood and clear signs of schizophrenia onset in early adulthood prior to the offense. Based on that review, Dr. Sultan opined that Thompson displayed significant signs of mental illness from the time he was a small child and manifested symptoms of schizo-affective disorder in early adulthood, prior to the 1985 offense.

The principal bases for Thompson's petition and amended petition for writ of habeas corpus were his allegations that trial counsel were ineffective for: (1) failing to perform a reasonable investigation of his background and mental health history; (2) failing to secure adequate expert assistance regarding his mental health; and (3) failing to reasonably investigate and challenge

Thompson's competency at the time of the offense. Thompson also claimed he was denied funding for mental health and investigative experts during the state trial and post-conviction proceedings.

Thompson's initial witness list represented that Dr. Crown would testify that Thompson's brain damage, as well as his medical and social history, are consistent with schizophrenia. The initial witness list further indicated that Dr. Sultan would testify that Thompson suffers from schizophrenia and did so at the time of the offense. Moreover, from the outset habeas counsel represented to the district court, through the pleadings, that Thompson would establish that trial counsel failed to present available mitigating evidence. Indeed, the district court's November 1998 ruling affirming the magistrate judge's November 2, 1998, discovery order explicitly stated that if the facts were developed to show that Thompson's mental health should have been introduced as mitigating evidence, Thompson might be entitled to relief.

Despite the representations in his initial witness list, as Respondent discerned on July 20, 1999, Dr. Crown had no opinion as to Thompson's mental state at the time of the offense. In other words, at the time of Dr. Crown's deposition, eight months after the initial witness list was filed and several days before Thompson's response to the summary judgment was due, Dr. Crown had not been asked to form an opinion on the issue he was purportedly retained to evaluate and the key issue in the case. Dr. Crown's deposition testimony *verifies that habeas counsel never asked him to render an opinion as to Thompson's mental state at the time of the murder.* Furthermore, even though Dr. Crown concluded that Thompson had a schizoaffective disorder, which he acknowledged tends to develop

in late adolescence to early adulthood, and which he further acknowledged appeared to have begun in the last stages of Thompson's military career, Dr. Crown stated that he was not asked, and had not pinpointed, the onset date.

In contrast, in the initial witness list, Petitioner stated that Dr. Crown would testify that he had "been provided with background information regarding Petitioner's medical and social history," and "administered a battery of indicated neuropsychological tests," which would "indicate that Petitioner suffers from organic brain damage." The witness list further represents that Dr. Crown would testify "that the brain damage observed, as well as Petitioner's social and medical history, is consistent with schizophrenia," and that "Petitioner's brain damage substantially impaired the ability of the Petitioner to distinguish between right and wrong and/or to conform his conduct to the requirements of the law." The disparity between Dr. Crown's actual deposition testimony and the witness list is patent.

Less clear is why habeas counsel did not ask Dr. Crown for an opinion on Thompson's mental status at the time of the offense. Habeas counsel's attempt, in response to Respondent's motion for reimbursement of deposition costs, to shift the burden of procuring such an opinion from Dr. Crown to Respondent, is absolutely audacious. Habeas counsel actually argued that Respondent had the burden of procuring that opinion from Dr. Crown. How ironic that habeas counsel would suggest that procuring such expert opinion testimony was somehow the Warden's burden, given that habeas counsel equally faulted defense trial counsel for failing to procure and present same. We have a hard time believing that, on the brink of summary

judgment, habeas counsel somehow got confused over who had the burden in the habeas proceeding of proving ineffective assistance of trial counsel.

More outrageous is Kissinger's representation on behalf of his client in that same response that Dr. Crown's statement substantially conformed to the information contained in the initial witness list because Dr. Crown stated "in passing" in his deposition that Thompson suffers from a bipolar disorder of a self-afflicted type and that the onset of this affliction was prior to the alleged offense. As review of Dr. Crown's deposition testimony makes clear, Dr. Crown stated Thompson has a schizo-affective disorder, which typically occurs in early adulthood, but Dr. Crown also made clear that he was not asked to opine whether Thompson actually manifested symptoms prior to the offense and further stated that he had "no real pinpoint."

Again we cannot escape the irony of Kissinger's assertions in that motion that Respondent either made "a strategic decision" not to procure Dr. Crown's opinion regarding Thompson's mental health at the time of the offense, or that Respondent "forgot to do so."[18]

Most troubling of all, of course, is the presence and substance of Dr. Sultan's testimony. Dr. Sultan conducted the background investigation, interviewed Thompson's

[18] Also disturbing was habeas counsel's parallel motion for reimbursement costs for the deposition of Dr. Blau. Habeas counsel scheduled that deposition prior to the depositions of Drs. Crown and Sultan, knowing full well that all the information Respondent had was what habeas counsel had stated in the initial witness list. Such gamesmanship, on the eve of the due date of Thompson's response to Respondent's motion for summary judgment, is inexcusable.

family members and provided the *exact* diagnosis that habeas counsel claims trial counsel was under a constitutional obligation to discover and present. And she provided the service *at Kissinger's request.* The record reflects that habeas counsel were in communication with Dr. Sultan as early as August 1998. In an affidavit signed on February 10, 1999, attached to Thompson's ex parte motion for a temporary mandatory restraining order, Dr. Sultan alleged that she had reviewed hundreds of pages of records and documents about Thompson's psychiatric, military, and legal history, and had first met with Thompson on August 20, 1998. Kissinger, through Chavis, asked Dr. Sultan for that opinion, received a report with that exact conclusion on July 22, 1999 and heard Dr. Sultan testify to that effect on July 22, 1999. After all, Kissinger was counsel of record for Thompson at Dr. Sultan's deposition. How then could counsel fail to include any mention of Dr. Sultan's expert opinion in Petitioner's response brief to Respondent's motion for summary judgment? It is virtually inconceivable to think that counsel could overlook this information as he was preparing the response to the summary judgment motion. Dr. Sultan's deposition testimony and accompanying report were obtained a *mere seven days before the brief was filed.* How could counsel possibly forget about its best evidence, and in such a short span of time?

Habeas counsel's conduct following the district court's issuance of its opinion granting summary judgment to Respondent seriously undercuts the possibility that habeas counsel's account is believable. On March 2, 2000, two weeks after the district court granted summary judgment to Respondent *in an opinion which explicitly stated that Thompson had failed "to provide this Court with any significant probative evidence that Thompson was*

suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigating evidence," Thompson filed a motion to alter or amend judgment. Habeas counsel claimed that it filed that motion "[i]n an effort to fulfill his duty to both his client and the Court." Yet the motion does not attempt to present the "forgotten" evidence, Dr. Sultan's opinion. Instead, it merely presented two clarifying arguments. Ironically, habeas counsel stated that while not waiving or conceding any of the other arguments previously raised, the motion centered on these two issues because they went "to the very integrity of the judicial process." If counsel's "failure to remember" Dr. Sultan's testimony, after a pointed reminder by the district court that "Petitioner had two different psychological evaluations and both resulted in findings of competency at the time of the crime and at the time of trial," is not reckless disregard for the truth, what is?

And habeas counsel apparently continued to forget about Dr. Sultan's opinion. Habeas counsel waited still another year to bring this information forward. And it waited for a year from the district court's denial of Thompson's motion to alter or amend judgment, not one year from the date of the underlying judgment. As the district court pointed out, this motion was untimely, because the plain language of Rule 60(b) sets an absolute time limit on the motion of one year in addition to the requirement that the motion be filed within a reasonable time. Fed. R. Civ. P. 60(b). The district court therefore lacked the authority to grant relief. *See Ackermann v. United States,* 340 U.S. 193, 197 (1950) ("A motion for excusable neglect as provided in Rule 60(b)(1) must, by the rule's terms, be made not more than one year after the judgment was entered.").

Again, we find it curious that habeas counsel's remembrance of depositions past came just a hair too late to fit within the parameters of Rule 60(b).[19]

Then, for the first time, counsel offered to supplement the record with Dr. Sultan's report and deposition testimony upon its enlightened view that "Dr. Sultan's opinions certainly are directly relevant to the mental health related claims," and further acknowledgment that "[c]ounsel for Mr. Thompson engaged in Dr. Sultan's services *for the sole purpose of offering her opinion to support his constitutional claims.*" Habeas counsel argued excusable neglect based on a heavy caseload and a disorderly office, and further stated that Kissinger "was under the mistaken belief" that the evidence was in the record. In a footnote, Kissinger further explained his "mistaken belief" as follows: Because Respondent had placed Dr. Crown's deposition testimony and accompanying report in the record, as part of its motion for reimbursement costs, and because Respondent had moved for costs in hiring its own mental health expert, Dr. Blau, on the grounds that Blau's services were unnecessary as Petitioner had no experts to support the mental health related issues, Kissinger apparently assumed that *Respondent* would also have included the deposition testimony and report of Thompson's only other mental health expert to bolster its request for deposition costs.

This explanation makes little sense. In the first place, Dr. Sultan's deposition testimony and accompanying report,

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[19] As reflected in its order denying Petitioner's motion to alter or amend judgment, the district court obviously sensed that something was amiss, but its hands were tied by counsel's strategic choice to file an untimely Rule 60(b)(1) motion.

unlike Dr. Crown's, do support the mental health related allegations and is consistent with the witness list statement. More importantly, Kissinger's explanation seeks to obscure the fundamental fact that Thompson's habeas counsel had an independent responsibility to both Thompson and the court to present Dr. Sultan's opinion in Thompson's opposition to Respondent's motion for summary judgment, and ultimately, to meet Thompson's burden of establishing that he was entitled to the requested relief, a grant of the writ of habeas corpus based on constitutional error. Kissinger's attempt to shift the "blame" to Respondent is *in*excusable.

Furthermore, habeas counsel's filing of an obviously untimely Rule 60(b) motion can be conceived of as "a fraud perpetrated . . . so that judicial machinery cannot perform in the usual manner." That is precisely what happened in this case. The district court was prevented from administering full justice because it lacked all of the vital information necessary to afford the proper relief.

As exhaustively detailed above, the essence of Thompson's claim *throughout the entire course of the state and federal proceedings* was that he was suffering from a mental disease or defect at the time of the offense. Habeas counsel *criticized trial counsel for failing to procure this evidence,* and was aware from the outset how it needed to establish ineffective assistance of trial counsel at mitigation, as reflected by its early decision to retain Drs. Crown and Sultan. Habeas counsel then did exactly what it faulted trial counsel for failing to do.[20] That is, habeas

[20] Trial counsel cannot be faulted for relying on the evaluation of a credentialed expert which was entirely consistent with the evaluation of an inpatient psychiatric team specializing in forensics that also

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counsel conducted the investigation that it alleged trial counsel were constitutionally ineffective for failing to perform. That investigation revealed that Thompson was suffering from a serious mental illness at the time of Brenda Lane's murder. It also revealed significant aspects of Thompson's social history long recognized as mitigating in other capital cases. This Court simply cannot, at this juncture, accept counsel's explanation that it forgot to remember that critical evidence until slightly one year after judgment. There appears to be no acceptable excuse for habeas counsel's behavior.[21]

concluded Thompson was not mentally ill. Nonetheless, as previously discussed, trial counsel's failure to investigate and present Thompson's social history provides an independent basis for finding ineffective assistance of counsel at mitigation under *Wiggins*.

[21] We can only assume that habeas counsel planned to unveil Dr. Sultan's opinion on the eve of Thompson's execution. Judge Moore differs, concluding that "more than likely, a genuine mistake was made, one which was not realized until a different attorney looked at the case. To conclude otherwise is to disbelieve sworn testimony by an officer of the court, and to assume that habeas counsel conspired to conceal evidence beneficial to their client, for no discernible reason."

Once again, if one reminisces, the capital case of *Byrd v. Collins,* 209 F.3d 486 (6th Cir. 2000), *cert. denied,* 531 U.S. 1082 (2001) (first habeas petition), and *In re Byrd,* 269 F.3d 544 (6th Cir. 2001) (successive petition) comes quickly to mind. There, habeas counsel sat for twelve years on an affidavit by a codefendant that allegedly would have established petitioner Byrd's actual innocence, and did not file their second habeas petition introducing the evidence and "actual innocence" argument until one week before the petitioner's scheduled execution date. On this basis, a majority of the judges in regular active service invoked the inherent equitable powers of the court to stay the petitioner's execution and remand the matter for the development of a factual record. *See In re Byrd,* 269 F.3d 585 (6th Cir. 2001). So there may be a rational, strategic, calculated reason for habeas counsel's purported negligence.

IV. Response to Majority Opinion

The majority opinion agrees that Dr. Sultan's opinion requires us to vacate the district court's grant of summary judgment in favor of respondent. However, it posits that my opinion "goes too far in its accusations of fraud on the court;" on the grounds that "while his [my] explanation for the omission of the Sultan deposition from the official record before the court is possible in the narrowest sense, the power of this court should not be used to make such accusations without more definite proof than the factual record of this case reveals." Rather, the majority would find that the more plausible explanation is that "a genuine mistake was made, one which was not realized until a different attorney looked at the case," and that "[t]o conclude otherwise is to disbelieve sworn testimony by an officer of the court."

The majority opinion correctly recognizes that, at this juncture, I am inclined to disbelieve Kissinger's representations of excusable neglect because I find it utterly implausible that counsel could forget about his most important piece of evidence, expert testimony assessing Thompson's mental state at the time of the crime, given that his principal strategy throughout the habeas proceedings was to claim Sixth Amendment ineffective assistance of counsel based on trial counsel's failure to obtain that very evidence. From day one, habeas counsel knew that in order to make a successful constitutional challenge, he had to acquire an expert opinion to the effect that Thompson was suffering from schizophrenia at the time of the offense, as reflected by the fact that counsel hired two experts who would purportedly say that. Furthermore, even assuming short-term memory loss due to a crushing workload, Kissinger sat through Dr. Sultan's deposition a

mere seven days before he signed and filed the response to the summary judgment motion. On the eve of its filing, how could he, how did he, forget what Dr. Sultan said, and utterly fail to make the slightest allusion to her expert opinion – especially since she provided precisely what he needed to support his ineffective assistance claim?

Even assuming that Kissinger innocently suffered from virtual amnesia during this critical phase of the federal district court proceedings, and appellate habeas counsel Dana Hansen caught the error when she took over the appeal and tried to correct it, why then did she fail to appeal the district court's denial of the Rule 60(b) motion or otherwise seek to supplement the record on appeal under Fed. R. App. 10(e) given the obvious importance of that testimony and the gravity of the situation before us?[22]

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[22] I am also troubled by the fact that in Thompson's petition for writ of certiorari, signed by Dana C. Hansen Chavis, as counsel of record for Petitioner, Hansen refers to Dr. Sultan's opinion regarding Thompson's *as if it were properly presented to the district court and made part of the record.* In that brief, Hansen Chavis represents as follows:

> Thompson's habeas corpus alleged ineffective assistance of trial counsel via the failure to adequately investigate and obtain adequate expert assistance regarding Thompson's mental health at the time of the offense and failure to direct an expert inquiry into mental health mitigation and to obtain adequate expert assistance regarding Thompson's mental health at the time of the offense and failure to direct an expert inquiry into mental health mitigation and to obtain rebuttal evidence against the State's psychiatrist. Respondent moved for summary judgment, asserting only that the claims were either procedurally barred or the state court decision was not contrary to or an unreasonable application of federal law (Apx. 442) because Dr. Blair had not offered a final opinion on Thompson's mental health at the time of the offense (which, of course, she was prevented from doing

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by the post-conviction court's denial of funding). Respondent further asserted Thompson was not entitled to present further evidence in support of his claims in a federal court evidentiary hearing. Thompson responded to the summary judgment motion by asserting that he had not failed to develop the factual basis of his claim; instead, the state court had, through the after-the fact application of procedural rules governing the appointment of experts in state post-conviction cases, prevented him from fully developing his claim in state court and that he was therefore entitled to an evidentiary hearing to present further evidence in support of his claims.

When the district court issued its decision granting Respondent's motion for summary judgment, however, it bypassed Respondent's argument as well as Thompson's response and instead held that the claim would be denied because Thompson had failed to present affidavits or other evidence (Apx. 711). The district court never provided Thompson with notice of its intention to rely on this ground nor did it provide him with an opportunity to present such evidence prior to entering judgment against him. Thompson had such evidence in his possession and, contrary to the findings of the district court, most of it was in the record.

Habeas counsel had a neuropsychologist, Dr. Barry Crown, examine Thompson. The result was a finding of organic brain damage, secondary to schizo-affective disorder, bipolar subtype. (Apx. 711).

. . . .

Additionally, forensic psychologist Dr. Faye Sultan reported:

> It is my opinion that Mr. Gregory Thompson is most appropriately diagnosed, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as having Schizoaffective Disorder, Bipolar Type. As is typical of this illness, symptoms became apparent in early adulthood. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Thompson's ability to conform his conduct to the requirements of the law.

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> Further, Thompson was the victim of severe childhood emotional abuse and physical neglect. His family background is best described as highly neglectful and economically deprived. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There are significant aspects of Thompson's social history that have been recognized as mitigating in other capital cases (R. 133, Attachment A, Sultan report, p. 6).

Despite this unrebutted expert testimony the district court noted from the trial court record that "[t]he team at Central State concluded there was no organicity (brain damage) and Dr. Copple [the industrial psychologist] found no indication of brain damage" (Apx. 701) and ruled, due to a lack of affidavits "Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute" (Apx. 711). The petition was dismissed.

Thompson's Petition for Certiorari, p. 14-16 (emphasis added).

Hansen also represented that:

> The district court engaged in fact finding to grant Respondent's motion by crediting the opinions of Respondent's experts over Thompson's experts and by disregarding the findings of Thompson's experts that he was psychotic when he committed the offense (Apx. 657). The district court also did not give Thompson an opportunity to correct certain fundamental misconceptions upon which the district court's decision was based. The district court erred further by making findings that were unsupported or contradicted by other evidence, and drawing inferences adverse to Thompson, contrary to well-settled summary judgment standards.

Id. at 24.

Further, Hansen asserted that:

> The district court disregarded the rulings of Thompson's experts – in particular Dr. Blair's opinion that Thompson likely was schizophrenic when he committed the offense, Dr. Sultan's opinion that Thompson suffers from schizo-affective disorder and that his mental problems began while he was in the military – *i.e.* long before the offense. Instead the

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Kissinger's and Hansen's unusual performance is, and should be criticized as, inadequate, and should not escape close judicial scrutiny. Both of these attorneys are federal defenders, specializing in death penalty cases. If their conduct was negligent, then perhaps they should not perform this kind of work in the future. If their conduct was something more than that, then appropriate disciplinary action should be taken. Furthermore, my and the majority opinion's disagreement over the proper characterization of this conduct is precisely why there is a need for the district court or a duly-appointed Special Master to conduct a full evidentiary hearing on this issue to ascertain the truth.

The majority opinion correctly states that we could not consider Dr. Sultan's deposition testimony because it was not made a part of the record before the district court, and beyond the scope of our appellate review. *See Lippi v. City Bank,* 955 F.2d 599, 604 (9th Cir. 1992). *See also United States v. Barrow,* 118 F.3d 482, 487 (6th Cir. 1997) (stating that, "[i]n general, the appellate court should have before it the record and facts considered by the District Court"); *cf. Sovereign News Co. v. United States,* 690 F.2d 569, 571 (6th Cir. 1982) (stating that "[a] party may not by-pass the

court cursorily concluded Thompson had not provided "any significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence." *Id.*

Id. at 28.

In short, the brief before the United States Supreme Court accuses the district court of ignoring probative evidence *that it did not even have before it in any form* when it granted summary judgment to Respondent.

fact-finding process of the lower court and introduce new facts in brief on appeal"). Furthermore, appellate habeas counsel did not file a Fed. R. App. P. 10(e) motion to supplement the record[23] nor make any reference to Dr. Sultan's July 1999 testimony in the appellate brief.[24] Nor did appellate

[23] Federal Rule of Appellate Procedure 10(e) allows the appellate record to be supplemented "if anything material to either party is omitted from or misstated in the record by error or accident." Fed. R. App. P. 10(e). It "is clear from the rule's wording [that] '[t]he purpose of the rule is to allow the [] court to correct omissions from or misstatements in the record for appeal, not to introduce new evidence in the court of appeals.'" *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1012 (6th Cir. 2003) (quoting *S & E Shipping Corp. v. Chesapeake & O. Ry. Co.*, 678 F.2d 636, 641 (6th Cir. 1982)) (alteration in original). Dr. Sultan's July 29, 1999 testimony and accompanying report do not qualify as omissions from the record because Kissinger never referenced her expert opinion on the issue of Thompson's mental status at the time of the offense; i.e., he did not rely on that evidence as part of meeting Thompson's burden under Fed. R. Civ. P. 56.

[24] Thompson's appellate brief, prepared by Dana C. Hansen, provides merely that:

> Mr. Thompson then filed a petition for writ of habeas corpus under 28 U.S.C.A. § 2254 (West 2000), claiming *inter alia* ineffective assistance of trial counsel via the failure to obtain adequate expert assistance regarding Mr. Thompson's mental health at the time of the offense. Respondent moved for summary judgment while conceding that this point was properly cognizable on its merits (R. 82: Motion for Summary Judgment, p. 18-19; Apx. 442).
>
> The defense then had another specialist, Dr. Crown, examine Mr. Thompson. The result was a finding of organic brain damage, secondary to schizo-affective disorder, bipolar subtype. (R.124: Memorandum, p. 54; Apx. 711).

Final Brief of Appellant, Gregory Thompson, p. 14.

Later, Hansen asserted on behalf of Thompson that

> [t]he district court clearly weighed the *partial* testimony of Drs. Crown and Blair versus that of the state experts and made findings of fact in favor of Respondent. (*Id.* at 53-54; Apx.

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habeas counsel appeal the district court's 60(b) ruling. It is disingenuous for the majority opinion to suggest that we "had" the deposition before us at the time of the initial review and therefore had not just recently "unearthed" it. Indeed, had the deposition had been properly placed before this Court, we could have exercised our equitable powers at that time. Our previous decision was based on the absence of the evidence. The only reason we have it now was because I conducted an independent review of the record.

The majority opinion holds that we can exercise our inherent equitable power to supplement the record on appeal. Here I agree, because I feel that the "special circumstances" of this case – a fortuitous discovery that, if left unaddressed, will result in a grave miscarriage of

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710). This is improper at the summary judgment stage. *Anderson, supra.* The district court did not view the facts in the light most favorable to Mr. Thompson to determine whether any "genuine issue of material fact" appeared on which a reasonable fact-finder could return a verdict for Mr. Thompson.

Id. at 42.

Hansen never *mentions Dr. Sultan's name or refers to her opinion in the brief.*

However, Hansen makes ample reference to Dr. Sultan's testimony and report in Thompson's petition for rehearing. *See* Gregory Thompson's Petition for Rehearing and Suggestion for Rehearing *En banc* In a Capital Case, pp. 12-22. In fact, in support of the assertion that Thompson presented evidence that he was mentally ill at the time of the crime and trial, Hansen, presented, *inter alia,* ample quotations from and references to Dr. Sultan's testimony and report, attached to Thompson's Rule 60(b) motion. She failed to indicate, however, that said evidence was not properly presented to the district court, and therefore never part of the record for review to this Court. She did not indicate that she failed to appeal the district court's Rule 60(b) ruling. She did not invoke the inherent equitable powers of the Court.

justice – justifies our invocation of this authority. Indeed, by reviewing Dr. Sultan's opinions on the merits and altering the opinion, that is what I did in my capacity as a judicial officer. However, our inherent equitable authority to review material that was never reviewed by the district court to right a very grave wrong in this case should not immunize Kissinger's and Hansen's professional performance from further examination. Thus, although it provides a separate basis for jurisdiction, those inherent equitable powers should not be used to cover up potentially fraudulent conduct by counsel on the court by federal habeas counsel. Again, though, this matter needs a thorough examination in the district court.

Finally, if further investigation into the attorneys' conduct here is not pursued, this could create dangerous precedent. That is, it virtually invites habeas counsel to save their best evidence for last, thereby undermining principles of finality and the AEDPA. And, at the same time, it potentially encourages counsel to engage in risky strategy, because there is no guarantee that any given panel of the Sixth Circuit will bypass the strict procedural and substantive requirements of the AEDPA simply because the matter happens to involve the death penalty. Here, but for the chance discovery of the Sultan affidavit, this matter could have gone in a different direction, and Thompson might well have been executed as scheduled on August 19, 2004.[25]

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[25] Meanwhile, Gregory Thompson has been facing the true specter of the death penalty since at least January 9, 2003. For this fundamental reason, I feel that habeas counsel's performance was truly, horribly, ineffective.

V. Conclusion

In the face of this record, Kissinger's explanation is implausible, and if not intentionally false, most certainly appears to be in reckless disregard for the truth. Meanwhile, a man's life hangs in the balance. As in *Demjanjuk*, we have "acted pursuant to our inherent power to protect the integrity of the judicial process within this Circuit." *Demjanjuk*, 10 F.3d at 356. *Cf. Hazel-Atlas Glass Co.*, 322 U.S. at 244 (recognizing a court's inherent power to grant relief, for "after-discovered fraud," from an earlier judgment, "regardless of the term of [its] entry"). As part of the order of remand, I would instruct the district court to conduct full evidentiary hearings on both the issue of ineffective assistance of counsel at mitigation and fraud upon the court.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GREGORY THOMPSON, *Petitioner-Appellant,* *v.* RICKY BELL, Warden, *Respondent-Appellee.*	No. 00-5516

Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga.
No. 98-00006 – R. Allan Edgar, Chief District Judge.

Argued: November 1, 2001

Decided and Filed: January 9, 2003

Before: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Dana C. Hansen, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee. **ON BRIEF**: Dana C. Hansen, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee.

SUHRHEINRICH, J., delivered the opinion of the court. MOORE, J. (p. 47), delivered a separate opinion concurring in the result. CLAY, J. (pp. 48-73), delivered a separate dissenting opinion.

OPINION

I. Introduction

SUHRHEINRICH, Circuit Judge. Petitioner-Appellant Gregory Thompson ("Thompson") was convicted of first degree murder and sentenced to death in the Tennessee state courts. He appeals from the order of the district court denying his motion to alter or amend its grant of summary judgment to Respondent Warden Ricky Bell ("Bell") on Thompson's application for a writ of habeas corpus under 28 U.S.C. § 2254. This Court granted a certificate of appealability as to all issues presented.

Petitioner's principal argument on appeal is that he was denied his Sixth Amendment right to effective assistance of counsel in both the guilt and penalty phases of his capital trial because his trial attorneys failed to investigate and present evidence regarding his mental illness and social history and failed to present evidence in support of a life sentence. Because we find that Thompson has presented no evidence that he was mentally ill at the time of the crime or at trial, we **AFFIRM** the judgment of the district court.

II. Background

A. Facts

The following facts involving the underlying crime are summarized by the Tennessee Supreme Court:

> On December 29, 1984, Thompson and Joanne McNamara, a juvenile female, traveled by bus from Marietta, Georgia, to Shelbyville in Bedford County, Tennessee. They presented themselves as a married couple at the home of Willa Mae Odum, an acquaintance of McNamara's family who allowed them to stay. Ms Odum learned the two were not married and asked Thompson to leave, but he remained through the night of December 31, waiting for a relative to wire him funds for a bus ticket. The following morning, January 1, Ms. Odum again insisted that Thompson leave, and she called the authorities to report that Joanne was a runaway. This call apparently prompted their departure. The couple, having little money and no transportation, spent the afternoon at a nearby Wal-Mart store.
>
> Late that same afternoon, January 1, 1985, Brenda Lane, a local resident, made several purchases at the Wal-Mart, and did not arrive home when expected. Shortly after midnight her yellow Chevrolet was reported on fire near an apartment building in Marietta, Georgia. Thompson and McNamara were arrested by Cobb County authorities in connection with this investigation on the night of January 2. A traffic ticket in Thompson's jacket showed he had been cited for speeding, while driving Mrs. Lane's vehicle, at 8:25 p.m., on Interstate 24 near the Jasper-South Pittsburgh exit, the last exit before the Georgia line. A Wal-Mart receipt and several items in the

vehicle indicated a purchase at that store at 5:51 p.m. January 1. A button found in the car matched those on Thompson's clothing.

A few hours later, while in custody, Thompson gave a statement admitting that he had abducted a woman at knifepoint from the Wal-Mart location in Shelbyville and had forced her to drive him and his companion, in her car, to a remote location outside Manchester, Tennessee. There he had stabbed her, driven the car over her body, and left her. He and McNamara had returned to Marietta and attempted to burn the vehicle. He also drew a map illustrating the route from the town to the site of the stabbing and describing several structures and other features along the way. He spoke on the phone with authorities in Manchester to clarify his directions.

In the early morning hours of January 3, a team of searchers following Thompson's directions found Brenda Lane at the place indicated in his statement. She was dead from multiple stab wounds to her back. Two of the four wounds had been fatal, penetrating her right lung and causing her to bleed to death. A forensic pathologist testified that she would not have died immediately, but would have remained conscious for five to ten minutes. At the scene she lay on her back, her body arched, her heels dug into the ground. One hand clutched several blades of grass, and the other held a tissue. There was no evidence that she had, in fact, been run over by a vehicle. There was no evidence of a struggle, and apart from the stab wounds Ms. Lane was not injured.

State v. Thompson, 768 S.W.2d 239, 243 (Tenn.1989).

B. Pretrial Preparation

On January 29, 1985, the trial court appointed H. Thomas Parsons and John W. Rollins to represent Thompson. On February 26, 1995, Parsons filed a notice of insanity defense and also requested a mental or psychological evaluation of Thompson to determine whether he was competent to stand trial, and to further determine his mental capacity at the time of the crime.[1] On March 25, 1985, trial counsel filed a supplementary motion for a psychiatric examination and a neurological examination to determine whether Thompson was competent to stand trial and assist counsel with his defense, whether Thompson was suffering from a mental illness on the date of the offense, and whether he was in need of hospitalization for further psychiatric treatment and evaluation. In support, Parsons attached an affidavit stating that Thompson had previously suffered two concussions, one when he was sixteen years old from a car accident, and the second while in the Navy, when he was beaten in the head with a hammer by three fellow servicemen.

On March 28, 1985, the trial court ordered that Thompson be referred to the Multi-County Mental Health Center for a forensic evaluation to determine his competency to stand trial and to assist in his own defense, and his mental capacity at the time of the crime.[2] On April 4,

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[1] Rollins did not participate in Thompson's representation due to a conflict of interest, and was relieved of his appointment on April 9, 1985. Doyle Richardson was substituted as co-counsel the same day. He remained as counsel through the state proceedings on direct appeal.

[2] Specifically, the staff at Multi-County Mental Health Center was directed by the court, in part, as follows:

> The staff shall assess if, at the time of the criminal conduct, as a result of mental disease or defect, [the defendant]

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1985, the trial court entered another order directing Thompson to undergo a forensic evaluation at a state facility, Middle Tennessee Mental Health Institute ("MTMHI"), for a maximum of thirty days. A team of forensic psychiatrists and psychologists at MTMHI evaluated Thompson. They found Thompson to be competent.

Trial counsel questioned the impartiality of the state psychiatrists and psychologists and requested funds to secure further psychiatric evaluations.[3] On July 29, 1985, the state trial court granted the request. The order provides in relevant part:

> This cause came to be heard on the 10th day of July, 1985 . . . upon the request of defendant's attorneys for the Court to approve the expenses for a private evaluation of the defendant by a private psychiatrist and for the purpose of affording counsel the benefit of private expert psychiatric consultation in regards to the defendant. . . .

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lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. The terms "mental disease or defect" do not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.

[3] Trial counsel Richardson stated at the pretrial motion on July 10, 1985:

> I really don't believe he got an impartial review on that. It would almost appear from the reports that the psychiatrist is just an extension of the State. I don't believe he has had a really independent review, and it is something that the defendant is starting to complain about. I've got mixed emotions about an independent psychiatrist – it is sometimes a two-edged sword. Whatever is told to them, they can be called to testify about it and have to; but that's not to say that I don't need it.

> The Court is of the opinion that the Motion for resources is well taken . . . and that expert consultation is necessary to ensure that the constitutional rights of the defendant are properly protected.
>
> Accordingly it is hereby ORDERED that the charges of said psychiatrist . . . shall be paid by the executive secretary of the Supreme Court of the State of Tennessee for services performed by them on behalf of the defendant.

In spite of the court order approving a psychiatrist to examine Thompson, counsel used the court-ordered mental health funds to hire Dr. Copple, a clinical psychologist.[4] Doyle Richardson, one of Thompson's trial counsel, stated subsequently that the effort to hire a psychiatrist simply "was not successful."

As part of their pretrial preparation, counsel also traveled to Thompson's home town, Molena, Georgia. There, they interviewed police officers, Thompson's teachers, his grandmother, his step grandfather, sister, brother, cousin, and several neighbors.

C. Trial Proceedings

Thompson presented no proof during the guilt phase of the trial, and the jury convicted him of first degree murder of Brenda Lane. *Thompson*, 768 S.W.2d at 244.

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[4] On June 20, 1985, trial counsel filed a "Notice of Intent to Use Industrial Psychologist." The notice stated that Thompson intended "to use the testimony of Dr. George Copple, Clinical Psychologist, in the trial of this cause in regard to defendant's mental condition and abilities."

Trial counsel testified at the post-conviction hearing that they felt the guilt phase case could not be defended.

During the sentencing phase, Thompson called a number of witnesses, including former high school teachers, acquaintances, his grandparents, two siblings, and a cousin. All described Thompson as non-violent, cooperative, and responsible. *Id.* Witnesses described in detail his childhood and family circumstances in Georgia until he left in 1979 to join the Navy. The Tennessee Supreme Court noted in its opinion that, "while [Thompson's] family was poor, it was also good and loving." *Id.*

Arlene Cajulao, Thompson's girlfriend while he was stationed with the Navy in Hawaii, testified that she knew Thompson from December 1980 until June 1984. She described their relationship as good, one that she was "very proud to have experienced," and stated that Thompson was caring and sensitive. She testified that Thompson suffered a head injury when three of his fellow service members attacked him with a crow bar and that he became paranoid and unreasonably concerned about his and her personal safety thereafter. *Id.* On cross-examination, Cajulao testified to incidents concerning Thompson's violent behavior in the Navy. She stated that Thompson was discharged from the Navy after being court-martialed for shoving a petty officer and either dislocating the officer's shoulder or breaking his collarbone. Cajulao acknowledged that Thompson had other violent episodes in the Navy. *Id.*

Thompson's sister, Nora Jean Walton, and his brother-in-law testified about Thompson's activities in Georgia upon his return from Hawaii after his discharge from the Navy. *Id.* While in Georgia, Thompson became involved in

a relationship with Joanne McNamara. Walton testified that Thompson told her that McNamara's mother was trying to force McNamara into prostitution. *Id.*

Copple also testified at sentencing. Copple is a clinical psychologist, licensed in the State of Tennessee. He obtained his Ph.D in clinical psychology from the University of Pittsburgh in 1948. He taught in the psychology department at Vanderbilt University from 1948 to 1969, and ran a clinical practice as well. At Vanderbilt, Copple taught normal psychology courses and the abnormal psychology course, child psychology, and courses in the giving of psychological testing. While at Vanderbilt, he served as the consulting psychologist at Western State Hospital in Hopkinsville, Kentucky. Part of his duties there was to interview patients as to their ability to stand trial. Copple testified that "the main part of my work over the years – well, all of it – has been clinical psychology."[5] He added that the emphasis has differed at times, to include evaluations for social security applicants and vocational evaluations. Copple explained that the former task involved psychological evaluations of individuals alleging they have problems that would prevent them from

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[5] When asked on cross-examination whether he "basically [held] [himself] out as an industrial psychologist more than a clinical psychologist," Copple said:

> No. My licensing in the State of Tennessee is as a clinical psychologist. The application that I make of it most frequently is concerning the abilities and the lost abilities, to some extent, of individuals. I don't believe that – the majority of my work is actually Social Security Administration evaluations, and that is not really industrial psychology. That is clinical psychology, but it is from the standpoint of making a psychological evaluation as relating to whether a person can work anymore or not.

working, and that vocational evaluations are used for "helping people reach their vocational goals or choosing vocational goals. . . . " Copple further stated that the social security evaluations are "not really industrial psychology. That is clinical psychology, but it is from the standpoint of making a psychological evaluation as relating to whether a person can work anymore or not."

Copple testified that he spent roughly eight hours examining Thompson over several sessions. In the first session on May 15, 1985, Copple met with Thompson at MTMHI for three and one-half hours. Copple stated that "I was looking, at that point, at what things he might be capable of doing in a prison situation." Copple started with some ability testing, including a reading level test, a test of mathematical functioning, and a test of mechanical reasoning. Copple also gave Thompson a Career Preference Test.

At the second session on August 2, 1985, Copple spent about three and one-half hours with Thompson at the Coffee County Jail. At that meeting Copple administered the Minnesota Multiphasic Personality Inventory ("MMPI"), the Thematic Apperception Test, the Rotter Incomplete Sentences Blank, and the Rorschach or Ink Blot Test. Copple also had two twenty minute sessions with Thompson after the trial began.

Copple stated that Thompson had the arithmetic level of a seventh grader, and a sixth grade level in reading. Copple also stated that Thompson scored at about the 64th percentile of high school graduates on a standard reasoning test. Copple testified that, in his opinion, Thompson had an unusually strong need to nurture other people, and that this "exaggerated need for nurturance" of McNamara,

may have led, in part, to the murder of Mrs. Lane. In Copple's view, Thompson's need to nurture "was very strong, strong enough to impel him to some unwise actions." Copple also testified that Thompson exhibited strong remorse for the killing and did not have adult antisocial personality. On cross-examination, Copple stated that he did not think Thompson was suffering from any mental illness.

In rebuttal, the State presented the deposition testimony of Dr. Robert Glenn Watson, also a clinical psychologist licensed by the State of Tennessee, who had participated in a staff evaluation of Thompson at MTMHI. Watson stated that the purpose of the evaluation was to determine the mental competence of Thompson to stand trial and to determine his mental status at the time of the alleged murder. Watson explained that Thompson received three kinds of examinations; a physical examination, which included an electroencephalogram, a psychological evaluation, and a psychiatric examination. Watson testified that the electroencephalogram showed no sign of brain damage, i.e. the EEG was normal.[6]

Watson described the tests he personally performed. First, he administered the Wechsler Adult Intelligence Scale, Revised, which assesses intellectual functioning and potential. Watson found that Thompson had a verbal I.Q. of 93, a performance I.Q. of 89, and a full-scale I.Q. of 91, which placed him in the lower-range intellectually, and also indicated "that there is no intellectual impairment that would play a part in the forensic questions." Next,

[6] Watson stated that he did not interpret the EEG, which is a medical test.

Thompson was given the Wide-Range Achievement Test, primarily for the purpose of assessing his reading ability. Watson explained that this test was chosen because Thompson had claimed he could not read or write. (*Id.*) Watson found that he was reading at a level better than 70 percent of the test population. Third, Watson gave the Bender Visual Motor Gestalt Test. Watson stated that this test provides a general assessment for brain damage. He further explained that it is a drawing test, and that "we are looking for evidence of organicity there." When asked to explain what he meant by organicity, Watson, replied:

> Psycho-motor impairment. This is brain damage. There was a history in his background of a concussion at age 16 with reported hospitalizations. We didn't have the records from that. He also had a history of being hit over the head with a hammer while he was in military service in 1980. We were looking for brain damage.

Watson continued:

The results of the Bender showed a few errors, but no real evidence of organicity or brain damage. To further test this, the Bender Interference Procedure was done, and what we expect is that the results of that procedure will be worse than the results obtained on the original test . . . [i]f he is suffering from organicity. . . .

> We found less errors on the B.I.P. – the Bender Interference Procedure – than on the original, and this further strengthened our belief that there is no serious organicity here.

Watson also performed the MMPI. He stated that this test was administered for the purpose of assessing deviations from the normal test population, indicative of some type of mental illness or defect. Watson found that the test results reflected malingering. Thompson was further given the Tennessee Self-Concept Scale, which measures the individual's self-concept, but also provides clinical indications of abnormality. Watson stated that the test results showed that Thompson has a good self-concept. Watson continued that only the General Maladjustment Scale was elevated a little bit above average, but not outside normal limits, and that "these results showed no evidence of marked mental disturbance." Watson testified that the psychological tests were therefore consistent with the normal EEG. Because the psychological tests and the EEG were within normal limits, no further organic tests were done.

Watson stated that on May 24, 1985, a staff conference was held in which all the data, including the medical, psychological, and social history, was reviewed and summarized.[7] The staff concluded that:

> [Thompson] exhibited none of the signs of an affective illness. His judgment and insight are rather poor. Psychological testing revealed him to be functioning in the average range intellectually, to exhibit no signs of organicity or brain damage on the Bender-Gestalt Test and the Bender Interference Procedure. Personality profiles revealed no evidence of a psychosis, but indicated malingering in the mental illness

[7] Watson testified that although he was aware of Thompson's head injuries, he did not have the hospital records.

> direction. (For example, the schizophrenic score was at T 120, while clinical observations revealed no evidence of a thought disorder.)

The team diagnosed Thompson as Axis 1, Adult Antisocial Behavior, 071.01.[8] The forensic team therefore concluded that Thompson was mentally competent to stand trial and was not suffering from a mental disease or defect.

In imposing the death penalty at the conclusion of the penalty phase, the jury found three aggravating circumstances pursuant to Tenn. Code Ann. § 39-2-203(i) (1982): (1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, (2) the defendant committed the murder for the purpose of avoiding or preventing his lawful arrest and prosecution, and (3) the murder was committed while the defendant was engaged in committing robbery or kidnapping. The trial court entered judgment sentencing Thompson to death by electrocution. His judgment of conviction and death sentence was affirmed by the Tennessee Supreme Court. *Thompson,* 768 S.W.2d at 253. The United Supreme Court denied certiorari. *Thompson v. Tennessee,* 497 U.S. 1031 (1990).

D. State Post-Conviction Proceedings

On October 16, 1990, Thompson filed his original petition for post-conviction relief in the Coffee County Criminal Court, claiming, *inter alia,* ineffective assistance

[8] The number refers to the catalog number of the diagnosis in the *Diagnostic and Statistical Manual,* 3rd Ed. Watson explained to the jury that adult antisocial behavior is not a per se mental illness or defect or mental disorder, but a recognized set of behaviors.

of trial counsel.[9] Thompson alleged in pertinent part that trial counsel failed to: (1) adequately investigate Thompson's background and personal and medical history for the existence of mitigating evidence; (2) request and obtain expert and investigative assistance regarding Thompson's head injuries or to obtain adequate expert assistance regarding Thompson's competency at the time Thompson made incriminating statements to the police; (3) present an adequate defense at trial because they failed to cross-examine numerous witnesses and failed to challenge the prosecutor's implication to the jury during closing arguments that Thompson was required to present a defense; (4) request additional time to prepare witnesses, such as Arlene Cajulao, during the penalty phase of the trial; (5) adequately investigate Thompson's military career, therefore improperly raising the issue of his "good character" and opening the door for the prosecution to admit damaging information about him.

On February 1, 1991, post-conviction counsel filed an *ex parte,* sealed motion for funds for expert assistance of a psychologist and investigator. In the motion counsel requested "funds to hire a licensed psychologist or psychiatrist and an investigator to assist in the preparation of his case for post-conviction relief." Counsel submitted the affidavit of Dr. Gillian Blair, a licensed psychologist. Blair stated that she reviewed Thompson's post-incarceration medical records, which indicated that Thompson had been variously diagnosed as having bipolar affective disorder, a schizo-affective disorder, and schizophrenia paranoid type, and was taking Lithium, Haldol, and Cogentin. Blair

[9] During this stage of the proceedings Thompson was represented by new counsel.

opined that "[i]f Mr. Thompson is found to be suffering from neurological or psychological impairment as described above, it is likely that some degree of such impairment would have existed at the time of the offense and would have been a significant factor in determining whether or not Mr. Thompson was able to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law when he committed the homicide of which he stands convicted." Blair stated that Thompson was in need of a full psychological evaluation.

The state trial court conducted an evidentiary hearing on March 27 and 29, 1995. Both of Thompson's trial counsel testified. Defense attorney Parsons testified that he knew about the head injuries, which included "one in a car wreck when he was young and at home and another as a result of an assault in the military." Parsons also acknowledged that trial counsel attempted to, but did not obtain, all of Thompson's medical records. Parsons indicated that trial counsel did not present evidence at trial of Thompson's head injuries because "we would had to have some expert proof and we did try to have him tested through the State and they did do some tests on him in an attempt to develop that." Parsons further stated that trial counsel also had their own expert, Copple.[10]

On cross-examination, Parsons acknowledged that trial counsel had sought a mental evaluation and that it failed to show mental illness or defect. Parsons further agreed that since there was virtually no likelihood that

[10] Parsons stated that Copple was chosen because co-counsel Richardson had taken a course from Copple while Richardson attended Vanderbilt and Copple was the head of the psychology department.

another psychiatrist could find mental illness, counsel "wanted to develop from Dr. Copple his testimony that [Thompson] had some positive characteristics, had abilities that would be beneficial to society wherever he was." Nonetheless, in response to the question that there was no evidence of organicity and that Copple had concluded that Thompson was sane, Parsons stated:

> The thing that struck me so strongly throughout this whole case was really to do with that, and that was the difference in the man when he lived in Georgia and grew up there and what kind of person he was as opposed to someone who committed – allegedly committed this act, this murder and that was a tip off that there may well have been some kind of brain injury, but I didn't know a whole lot about that at the time but since, I have found that most closed head injuries will do a lot of things, and we read some articles, one of which you will get in this discovery about that.

Parsons further reflected that

> Well, I could never figure out why it happened, assuming it happened, assuming he killed her. Of course, either he did or his girlfriend did but I could never understand how he could do it. I couldn't understand that then and why, because there were other alternatives. Why? That puzzled me and everybody else, I think, associated with this case all the way through it.

> Regarding efforts to find a psychiatrist Parsons stated:

> I do want to say this and this is sincere. You know, we were required to send him for the evaluation, we felt, at the Middle Tennessee

> Mental Health Institute. I have literally no faith in any conclusion that comes out of that place, then or now. I didn't have any faith in what came out of it then. I still thought something might be wrong but we didn't have any other place to go that we knew of.

Notwithstanding, Parsons denied that trial counsel failed to pursue the head injury theory, although he conceded that "we may have not pursued it enough."

Co-counsel Richardson testified that Thompson told counsel about his head injuries and that they followed up on that by hiring "Copple, a clinical psychologist, [who] gave him a battery of tests in respect to that."[11] Richardson acknowledged that the team at MTMHI found no evidence of organicity, but added that "we wanted a psychiatrist of our own." Richardson stated:

> [We d]id try to hire a psychiatrist but that was not successful and it was, you know, it was the type [of] thing it was a theory as to whether to go with his good character and reservoir of moral upbringing, a man with a great deal of ability that could be used in the penitentiary and a life sentencing. I doubt if there will ever be another man on death row that had as good a background as he did. I don't know of any, and then the question as to whether to mix into that or try to accentuate some brain damage that we hadn't been

[11] Richardson stated:

> I believe the tests that they gave – that they give will reflect whether or not there is some brain damage or not. . . . I believe clinical psychologists do this for psychiatrists. They do the testing that will detect if a person's brain is not functioning properly from injury.

> able to spot, but at the same time, probably with some more digging may [sic] could have and then give the jury the idea that this man, if he ever gets out of prison with some brain damage, he will kill . . . somebody else, that is kind of counter productive. We went with one strategy and probably if we had to do it over again, would go with the other strategy because that one didn't work.

However, when asked: "[o]f course, it is speculation you could have found a psychiatrist to say he had brain damage?" Richardson stated that he "[p]robably could have."

Dr. Gillian Blair testified next. Blair is a clinical psychologist, with a master's degree in developmental and clinical psychology from Vanderbilt, and a Ph.D. in developmental and clinical psychology from Vanderbilt. After graduating from Vanderbilt in 1988, Blair worked at MTMHI as a psychologist in their Forensic Services Department and at the same time maintained an appointment at the Vanderbilt Psychiatry Department. In 1989 she went into private practice.

Blair testified that she began reviewing Thompson's institutional records in 1990, including the records from the assessment at MTMHI in 1985. She interviewed Thompson several times in March and April 1992 while he was incarcerated at Riverbend Maximum Security Institution. At that time Blair administered "a basic psychological battery of tests with some additional . . . neuropsychological tests because of the history of head injuries that Mr. Thompson had received and that were well documented in his medical record."

Blair testified that, based on the review of Thompson's medical record, she formed the following opinion:

The Riverbend medical record indicated that since 1985, Mr. Thompson had shown a deteriorating mental status. He had become psychotic. He had been treated with anti-psychotic medication at that time. He was treated with Haldol, Cogentin, and Lithium, and three different treating psychiatrists at that time: Dr. Dyner [sic], Dr. Deal, and Dr. Humble had all over the years from 1985 to 1990 had diagnosed him as either having bipolar disorder or a schizo affective disorder or schizophrenia. They described his agitated behavior. They described his hostility. They described his inappropriate affect, his experience of auditory hallucinations, his delusions, his paranoia, his thoughts of persecution. He had attempted suicide on a couple of occasions. He had set fire to his cell burning both his hands and his face. They had certainly – two of those psychiatrists and maybe all three of them had considered the possibility that he was malingering, that he was faking mental illness and throughout their Riverbend records, it was clear that those psychiatrists had discounted the possibility of malingering because they didn't feel that it accounted for all of the psychotic symptoms they saw in him.

When asked what other facts would be necessary for her to develop an opinion as to Thompson's condition at the time of the offense, Blair stated that "the most important thing that would be necessary would be a full history and full medical records of Mr. Thompson prior to the commission of the offense." She added:

> From the records I was able to review, it was clear that the social history was very sketchy in terms of his remote history, his childhood and his upbringing, and also family history of mental illness. There seemed to be a [sic] strong evidence to suggest that there was mental illness in his family, probably in his father who committed suicide and was known to be extremely violent and possibly in his mother but none of those records were available.

She therefore stated that she did not have an opinion about Thompson's diagnostic status in 1985.

On cross-examination, Blair testified that she reviewed all of the records that are in the medical record from MTMHI. This included daily progress notes, medication sheets, the report of the psychological testing, the discharge summary, the admission summary, the staff conference report, and the social worker's history. When asked if she thought any of the test procedures were unreliable, she stated that she did not review the raw test data. When asked if she thought that the testing procedure done at MTMHI in 1985 was unreliable, Blair responded: "I don't think it was unreliable. I think that it was not extensive enough." When asked what tests she performed, Blair explained:

> The tests that I administered in 1992 that directly addressed whether there was psychosis or not, I administered the PAI, I administered the MMPI II which replaces the MMPI which was administered in 1985. I administered the Rorschach which was not administered in 1985. The PAI was not administered in 1985. I administered the MCMI II and I administered the Rorschach, which is a projective test of personality which was not – the others are all objective. They are all tests in which an individual answers true or false and the Rorschach is very different.

Blair stated that from her battery of tests, she did not conclude that Thompson was faking or attempting to fake mental illness.

On May 15, 1995, the post-conviction court denied Thompson's claim, including his ineffective assistance of counsel claim and his request for funding to hire an expert. The court found:

> 1. Defense counsel made an adequate investigation of their client's background and prior medical history. Present counsel presented no proof of mental problems on the part of Mr. Thompson that would have been a defense to the charge, or that would constitute a shield against execution.
>
> 2. Counsel did not seek expert and investigative assistance regarding alleged head injuries to Mr. Thompson during his youth, or to testify as to his incompetency at the time of his confession, because the facts and circumstances did not indicate the necessity for such action.
>
> 3. Counsel did not fail to present an adequate defense at trial. The facts simply left them with no effective defense.

Thompson appealed to the Tennessee Criminal Court of Appeals. He alleged that his trial attorneys were ineffective for failing to (1) interview witnesses who could have aided in his defense, especially during the penalty phase, (2) adequately investigate his prior head injuries, and (3) adequately prepare the defense witnesses.

The Tennessee Criminal Court of Appeals affirmed. *See Thompson v. State*, 958 S.W.2d 156 (Tenn.Crim.App. 1997). It concluded that Thompson failed to demonstrate

any psychological impairment that may have existed which would have constituted mitigating evidence or that Thompson's alleged head injuries had any effect upon his mental stability at the time of the murder. *Id.* at 165.

As for Thompson's claim that trial counsel were ineffective for failing to interview witnesses to show that his head injuries might have contributed to his commission of the crime, including among others, his step-father, attorney in the military, and the mother of his co-defendant, the court found that Thompson was unable to show prejudice because none of the witnesses testified at the post-conviction hearing. *See id.* at 163-64. "We cannot speculate upon the usefulness of these witnesses without the information they could have provided." *Id.* at 164.

Regarding the failure to investigate alleged head injuries, the Tennessee Court of Criminal Appeals held:

> Having determined there is a duty to investigate whether any psychological impairments might qualify as mitigating evidence, we nonetheless conclude that the petitioner has failed to demonstrate any prejudice from the failure of trial counsel to further investigate the head injuries. *The petitioner has failed to establish that the head injuries had any effect upon his mental stability at the time of the murder. Further, he has failed to establish that any type of psychological impairment in general may have existed which would have been mitigating evidence.* Because Dr. Blair declined to give an opinion on these important issues, the evidence does not preponderate against the trial court's finding that the defense attorneys were not ineffective.
>
> The decision not to further pursue the head injuries in the penalty phase of the trial also

> qualified as a reasonable strategy. Trial counsel's decision to emphasize the petitioner's positive qualities rather than to suggest brain damage, while unsuccessful, was based upon adequate investigation. [T]he fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference must be given to an informed trial strategy. . . . Because two experts did not detect brain damage, counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion.

Id. at 165 (emphasis added; internal quotation omitted).

The Tennessee Court of Criminal Appeals further rejected Thompson's claim that trial counsel did not properly prepare defense witnesses to testify, particularly, Arlene Cajulao, thereby permitting the state to inquire about his negative military history. The court found:

> At the post-conviction hearing, Attorney Parsons recalled wishing that he had more time to meet with the witness. He testified that his strategy at trial was to humanize the petitioner by calling sympathetic witnesses. He was aware of the state's opportunity to rebut any positive testimony about the petitioner and conceded that his only other option would have been to present no mitigating evidence at all.
>
> Attorney Richardson testified that "[t]here were certain witnesses that we had to face a problem of them bringing up the problems that he had in the Navy." He realized that the cross-examination of Ms. Cajulao might be risky but "didn't realize we would have it to the extent that it ended up we had. . . . "

> In our view, defense counsel's awareness of the possible dangers inherent in the cross-examination and their decision to present her positive testimony anyway was a classic tactical decision. Because the strategy was based upon adequate preparation, this court must not second guess. . . .
>
> Moreover, there is nothing in the record to suggest that additional preparation time with the witness could have prevented the state from effectively cross-examining her. If Ms. Cajulao were to testify at all to the petitioner's prior military background, the state would be entitled to rebut that testimony. In summary, we cannot hold that the evidence preponderated against the finding of the trial court that trial counsel had performed effectively.

Id. at 166.

Lastly, the Tennessee Court of Criminal Appeals rejected Thompson's ineffective assistance of counsel based on the claim that trial counsel opened the door to damaging evidence at the penalty phase. Thompson had complained that the state was allowed to present damaging evidence in rebuttal through Dr. Watson because trial counsel asked Copple about his good qualities. The Tennessee Court of Appeals reasoned:

> Attorney Richardson admitted, "I frankly did not know that . . . the [s]tate could use information given by the defendant to a psychiatrist." Attorney Parsons testified that their strategy was to emphasize positive attributes of the petitioner and show the jury that he could lead a productive life in prison. Dr. Copple's testimony played a key

role in this strategy. Although both trial attorneys apparently were surprised by the fact that the state could use the information acquired by MTMHI, Attorney Parsons did acknowledge that he knew that positive testimony by Dr. Copple would open the door for the state to present negative information.

Again, the petitioner has failed to establish any prejudice by whatever deficiency there may have been in the performance of counsel. The evidence does not preponderate against the finding that the sentence would have been different if the attorneys had known the information collected by MTMHI would have been admissible. In our view, trial counsel had little choice other than to call Dr. Copple in an effort to establish adequate mitigating circumstances. Even if there had been proof that trial counsel should have pursued a different strategy, there has been no indication that another strategy would have been more effective. Because the jury found three aggravators, we cannot conclude that the outcome would have been any different if the jury had not heard the evidence concerning the testing by MTMHI. If any witness testified to the petitioner's good character, the state would have been entitled to rebuttal. The only other option would have been to present no proof at all. As Attorney Richardson noted, the petitioner had a relatively productive background; the failure to present some evidence of his prior good behavior might have qualified as ineffective assistance.

Id. at 167.

The Tennessee Supreme Court denied Thompson's application for permission to appeal on October 20, 1997.

E. Federal Habeas Action

Thompson then brought this federal habeas action. Among numerous allegations, Thompson claimed that he was denied funding for mental health and investigative experts at trial and during state post-conviction proceedings, in violation of his right to due process. He also alleged a violation of his Sixth Amendment right to effective counsel. In particular, Thompson asserted that his trial counsel were ineffective for failing to: (1) perform a reasonable investigation of his background and mental health history; (2) secure adequate expert assistance regarding his mental health[12]; (3) discover available evidence of mental illness caused by two serious head injuries; and (4) investigate and challenge Thompson's competency to stand trial as well as his competency at the time of the offense.

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[12] The allegation reads in part:

> Counsel was ineffective for failing to fully investigate and present relevant evidence of Mr. Thompson's mental health history, and to secure adequate expert assistance to defend Mr. Thompson including psychologists, neuropsychological, and/or neurological experts to establish valid mitigating factors including, but not limited to, three statutory mitigating factors under Tennessee law, i.e., that Mr. Thompson suffered from substantial mental disorders and demonstrable physical brain damage which made him unable to conform his behavior to the law; left him under the influence of extreme mental or emotional disturbance, [and] substantially impaired his ability to appreciate the wrongfulness of his conduct at the time of the offense.

Again, in a separate allegation, Thompson alleged:

> Counsel failed to obtain adequate expert assistance, including confidential psychological, neuropsychological, and neurological experts.

In their Rule 26(f) [Fed. Rule Civ. P. 26(f)] report to the court, Thompson contended that discovery should be had regarding those matters alleged in his petition and such other federal constitutional errors that might be discovered during habeas proceedings. The Warden objected to discovery. On November 2, 1998, the magistrate judge issued an order allowing counsel to take the depositions of three mental health experts who had treated Thompson during his incarceration. The magistrate judge noted in pertinent part that the petition for writ of habeas included an allegation that executing the petitioner would violate the Eighth Amendment because he is incompetent to be executed. At the same time, the magistrate judge authorized the Warden to take the depositions of Thompson's two experts, psychologist Faye Sultan, and neuropsychologist Barry Crown.

On November 30, 1998, the district court affirmed the magistrate judge's order. The district court also expanded the scope of discovery:[13]

[13] On February 12, 1999, Thompson filed an *ex parte* motion for temporary mandatory restraining order, for preliminary injunctive relief, for permanent mandatory injunction, for an order finding petitioner incompetent to proceed, continuance, and to toll. Attached to that affidavit is the Declaration of Dr. Faye Sultan, a clinical psychologist with a Ph.D in clinical psychology from the University of Georgia. In that declaration Sultan stated that she had examined Thompson on a periodic basis since 1998. In Sultan's opinion as of February 1999, Thompson met all of the diagnostic criteria for major mental illness Schizophrenia, Episodic, with Interepisode Residual Symptoms. Sultan's affidavit does not discuss Thompson's mental state at the time of the offense. Rather, its focus was to address his then-current mental condition and alleged inability to proceed with the appeal process.

Thompson filed a motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 60(b) for the purpose of allowing him to supplement the record with the deposition and accompanying record of Dr. Faye E.

(Continued on following page)

> Additionally, if the facts are developed to show that petitioner's mental health should have been introduced as mitigating evidence, petitioner may be entitled to relief. . . . After a cursory review of the numerous volumes of state documents involved in this case, it appears that Thompson has alleged a factual basis for some of his claims and the magistrate judge so found. For example, petitioner claims trial counsel failed to properly investigate his mental health history and present mitigating evidence at trial and sentencing. Petitioner contends that he had two serious head injuries and intermittent bizarre and delusional thought patterns and witnesses to testify to such, and this mitigating evidence should have been introduced. Furthermore, petitioner contends that his institutional records reveal a diagnosis of schizophrenia with problems of auditory and visual hallucinations and paranoid ideation. If petitioner proves these factual allegations, he may be entitled to relief.

The Warden deposed Dr. Crown. Crown testified that he is a licensed psychologist in the State of Florida with a Ph.D. from Florida State University, and that he limits his practice to the areas of clinical and forensic psychology and neuropsychology. Crown met with Thompson for two and one-half to three hours on June 12, 1998. In that time he took a brief history and administered tests.[14] Based

Sultan, Ph.D. The district court denied it as time-barred by order dated March 7, 2001.

[14] Crown testified that the tests included:

> The Shipley Institutes of Living Scale; the G-F-W Auditory Selective Attention Test; the Category Test; the Kaufman Neuropsychological Assessment Procedure; the Luria Memory Test; the Reitan-Indiana Aphasia Screening Test; the

(Continued on following page)

upon those test results and the reports of the mental health professionals treating Thompson for the last fourteen years, Crown opined that Thompson suffered from some form of organic brain damage, which was secondary to a "schizo-affective disorder-bipolar subtype." Crown also found that Thompson had a significant auditory processing deficit, which means he is easily distracted by auditory stimuli. He further stated that some of the test results led him to conclude that there was some sort of organic brain damage.[15] (R91 p.24). However, Crown stated that he was not able to make an assessment of the severity of the damage and that he did not intend to. (R 91 p.28)

Crown did, however, conclude that Thompson was competent at the time of the examination on June 12, 1998. (R91 p. 47)

Significantly, Crown testified that he was only asked to render an opinion as to Thompson's competency at the time of the examination and not asked to render an opinion as to Thompson's mental status at the time of the offense or trial.

Rey-Osterreith Complex Figure Test; the Trailmaking Test; Word Generation, F/A/S; Finger Oscillation Test; and the Wisconsin Card Sorting Test.

(Dct. R. vol. 2 Exh. 91 p18)

[15] Crown defined "organic brain damage" as "damage to the brain that is of a physical nature, and that physical nature may be anatomic, it may be electrical, or it may be metabolical." (R.91 p. 40) When asked if he knew the causation for Thompson's brain damage, he replied: "I don't specifically know the causation. I believe it may be secondary to his thought disorder since we know that in people with thought disorders that the thought disorder itself may either be caused by or may result in some damage to the brain." (R.91 p. 40-41).

In rebuttal, the Warden offered the testimony of Dr. Theodore Blau.[16] Blau testified that he did not observe any indications of organic brain damage on the test he administered. However, Blau also indicated that he had not "come to an opinion that [he] would consider a complete profession opinion," and that the test he conducted "would be called at best screening." On the other hand, Dr. Blau stated that he would only want to conduct other neuropsychological tests if "there was a reason," such as a referral, observation or any difficulties during the testing that Thompson showed signs of left-hemisphere deficit.

The district court granted summary judgment to the Warden on Thompson's ineffective assistance of counsel claim:

> Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). . . . Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime and at the time of his jury trial. Nor has Thompson provided this Court with any significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence.

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[16] Only limited portions of Dr. Blau's deposition testimony were filed with the district court.

> Petitioner had two different psychological evaluations and both resulted in findings of competency at the time of the crime and at the time of trial. Additionally, the record shows that trial counsel did reasonably investigate Thompson's background and mental health history.

The district court held that Thompson was not entitled to an evidentiary hearing.

The district court granted summary judgment to the Warden on all of Thompson's claims, dismissed Thompson's petition for writ of habeas corpus, and denied any application of a certificate of appealability. This Court granted a certificate of appealability on September 12, 2000. Four issues are presented for review.[17]

III. Analysis

Our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *See Lindh v. Murphy,* 521 U.S. 320, 326-27 (1997). Under the AEDPA, a federal court may not grant a writ of habeas corpus to a state prisoner with respect to any claim adjudicated on the merits unless (1) the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1) (1994 & Supp. VII), or (2) the state court's decision "was based on an unreasonable application of the facts in light of the evidence presented

[17] Thompson indicated that he has consolidated the seven issues upon which the certificate of appealability was granted into four issues.

in the State court proceedings." *Id.* § 2254(d)(2) (1994 & Supp VII).

A state court's legal decision is "contrary to" clearly established federal law under § 2254(d)(1) "if the court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court on a materially indistinguishable set of facts." *(Terry) Williams v. Taylor,* 529 U.S. 362, 412-13 (2000). An "unreasonable application" occurs when "the state court identified the correct legal principle from [the Supreme] Court's decisions but unreasonably applies it to the facts of the prisoner's case." *Id.* Under this standard, a state court decision is not unreasonable simply because the federal court concludes that the state decision is erroneous or incorrect. *Id.* at 411. Rather, the federal court must determine that the state court decision is an objectively unreasonable application of federal law. *Id.* at 410-12. Factual findings by state courts are presumed correct. 28 U.S.C. § 2254(e)(1).

A. Appropriate Standards of Review

1. Adjudication on the Merits

First, Thompson argues that the district court erred when it reviewed Thompson's claims under the "all reasonable jurists" standard that was rejected by the Supreme Court in *Williams,* 529 U.S. 362. As a threshold matter, he asserts that the state court's decision on his ineffective assistance of counsel claim did not constitute an "adjudication" within the meaning of § 2254(d) because he was denied funds for expert assistance during his post-conviction proceeding and thus denied a "full opportunity

to litigate the issues" in state court, and the state court "failed to render a considered deliberation of the issues." Consequently, according to Thompson, § 2254(d) was inapplicable and the district court should have reviewed his claims under the pre-AEDPA de novo standard of review.

Thompson's argument touches upon a inter-circuit debate regarding the proper interpretation of "adjudicated on the merits" as that term is used in § 2254(d)(1). *See, e.g., Washington v. Schriver,* 255 F.3d 45, 52-54 (2d Cir. 2001) (discussing various approaches by the circuits; citing cases); *see also Schoenberger v. Russell,* 290 F.3d 831, 837-41 (6th Cir. 2002) (Keith, J., concurring). This debate centers largely on whether a federal constitutional claim is "adjudicated on the merits" and is therefore subject to the AEDPA's deferential standard of review, if the state court neither cited nor applied federal law. *See Washington,* 255 F.3d at 52-53; *see also Green v. Johnson,* 116 F.3d 1115, 1121 (5th Cir. 1997) (looking to whether a state court decision disposes of a claim substantively or procedurally).

Although this Court has "not directly analyzed AEDPA's requirement that a state court adjudicate federal claims 'on the merits' in order to warrant our deference," *Schoenberger,* 290 F.3d at 841 (Moore, J., concurring), "in *Harris v. Stovall,* . . . [18] we specifically held that the result of a state court's decision controls when the state court fails to explain its reasoning." *Id.* That is, "we stated that we could not 'grant relief unless the state court's result is not in keeping with the strictures of the AEDPA.'" *Id.* (quoting *Harris,* 212 F.3d at 943). Thus, in *Harris,* we

[18] 212 F.3d 940 (6th Cir.2000), *cert. denied,* 532 U.S. 947 (2001).

focused on the result of the state court decision relevant to the petitioner's due process claim since no state court had addressed it. And in *Doan v. Brigano,* 237 F.3d 722 (6th Cir. 2001), we held that the "contrary to" rather than the "unreasonable application" prong of § 2254(d)(1) governs because the state court "did not, as the Supreme Court defined an unreasonable application, correctly identify the governing legal principle only to unreasonably apply that principle to the particular facts of the case at hand." *Id.* at 730.[19] In *Schoenberger,* we reviewed the petitioner's claim that admission of certain testimony violated his rights of due process and to a fair trial, which the Ohio Court of Appeals did not directly address, under the following standard: "In the absence of a state court decision, we conduct an independent review of federal law to determine if the state court either contravened or unreasonably

[19] The Second Circuit observes that our view of § 2254's unreasonable application prong in *Doan,* namely that an "unreasonable application" analysis cannot be performed on a state court decision that fails to identify a state prisoner's federal claim, is in tension with our conclusion in *Harris* that when a state court decides a constitutional issue by form order or without discussion, a habeas court should focus on the result and perform an "unreasonable application" analysis. *See Sellan v. Kuhlman,* 261 F.3d 303, 313 n.5 (2d Cir. 2001). However, Judge Moore, the author of *Doan,* explained the apparent contradiction as follows:

> *Harris* denied habeas relief because the Supreme Court had not clearly established a defendant's right to a free copy of a transcript of his co-defendants' previous trial for the impeachment of witnesses in the defendant's trial. *Harris,* 212 F.3d at 945. In contrast, the defendant in *Doan* had a clearly established Sixth Amendment right to a fair and impartial jury. Therefore, the language in *Harris* about the state court's unreasonable application of federal law was dicta, and *Doan's* "contrary to" analysis controls.

Schoenberger, 290 F.3d at 842 (Moore, J., concurring).

applied clearly established federal law." *Schoenberger,* 290 F.3d at 835 (citing *Harris,* 212 F.3d at 943).

In this case, Thompson asserted in state post-conviction proceedings that counsel was ineffective for failing to adequately investigate prior head injuries. The Tennessee Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief on two grounds. First, the court held that Thompson had failed to establish prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984). *Thompson,* 958 S.W.2d at 162, 165. Second, the court found that trial counsel's tactical decision to emphasize Thompson's positive qualities at trial, rather than to suggest brain damage, was a reasonable trial strategy based upon adequate investigation. *Id.* In other words, the state court analyzed Thompson's ineffective assistance of counsel claim under *Strickland,* rendering a substantive analysis. Thus, the state court decision is not an unexplained, summary dismissal of a federal claim. Thompson's contention is utterly without merit.

2. Reasonable Jurists Standard

Second, Thompson argues that the district court's application in its § 2254(d)(1) analysis of the "debatable among reasonable jurists" standard, subsequently rejected by the Supreme Court in *Williams v. Taylor,* 529 U.S. 362, requires remand for reconsideration of his claims under the appropriate standard.[20] Although Thompson is correct that the standard applied below is no longer appropriate

[20] The district court rendered its decision prior to *Williams.* Thus, its reliance on the "all reasonable jurists" standard was proper at the time.

in light of *Williams,* remand is unnecessary because we must, in reviewing the matter de novo, rely solely on the Supreme Court's decision in *Williams* for the proper standard under § 2254(d). Remand is unnecessary unless the district court's decision cannot be upheld under that standard. *See, e.g., Harris,* 212 F.3d at 942 (affirming the denial of habeas relief even though the district court incorrectly applied standards under the AEDPA). Further, this court can affirm a decision of the district court on different grounds. *See Hammon v. DHL Airways, Inc.,* 165 F.3d 441, 445 (6th Cir. 1999).

B. Ineffective Assistance

Thompson argues that he received ineffective assistance of counsel in both the guilt and sentencing phases of his capital trial because counsel failed to investigate and present evidence regarding Thompson's mental illness and social history and failed to present evidence in support of a life sentence. Specifically, Thompson contends that trial counsel's decision to employ a psychologist at trial, rather than a psychiatrist, was objectively unreasonable under *Strickland.* He also claims that counsel failed to interview and present testimony of witnesses who could have testified about a "bizarre change" in Thompson's behavior after he graduated from high school that may have signaled the onset of mental illness.

In *Strickland,* the Supreme Court announced a two-part test for evaluating ineffective assistance of counsel claims. First, counsel's performance must have been deficient in that it fell below an objective standard of reasonableness. Second, there must be "a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different." *Strickland,* 466 U.S. at 687-94. At the same time, the *Strickland* Court cautioned that judicial scrutiny of defense counsel's performance must be "highly deferential." *Id.* at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

Because the Tennessee state court correctly stated the *Strickland* standard, the question we must decide is whether the state court unreasonably applied *Strickland* in this case. Under the AEDPA, it is not enough to convince the court in its independent judgment that the state courts applied *Strickland* incorrectly. Rather, a petitioner must show that the state courts applied *Strickland* in an objectively unreasonable manner. *Cone v. Bell,* 122 S. Ct. 1843, 1852 (2002).

A state court's conclusion that counsel rendered effective assistance is not a finding of fact binding on a federal habeas court. *Strickland,* 466 U.S. at 698. Both prongs of the *Strickland* standard involved mixed questions of law and fact. *Id.* We therefore review both the state court ruling and the district court decision *de novo. Carter v. Bell,* 218 F.3d 581, 591 (6th Cir. 2000).

1. Failure to Hire a Psychiatrist

Thompson contends that he received ineffective assistance of counsel at his capital trial because counsel failed to investigate his mental health and secure assistance from a psychiatrist.

To begin, to the extent that Thompson is claiming that trial counsel were ineffective because they failed to hire a *psychiatrist* rather than a psychologist, this argument is both procedurally defaulted and forfeited because it represents a transfiguration of Thompson's claim in the state courts and the district court that counsel failed to hire "adequate expert assistance" regarding his head injuries during his youth and his competency at the time of the crime.[21] Furthermore, post-trial counsel have themselves not consulted psychiatrists in their attempt to establish that Thompson suffers from organicity and mental illness. State post-conviction counsel contacted Dr. Gillian Blair, a clinical psychologist. Thompson's federal habeas counsel, the Federal Community Defender Services

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[21] Thompson's amended petition for post conviction relief provides in pertinent part:

> Counsel failed to request and obtain *adequate expert and investigative assistance* regarding Gregory Thompson's head injuries during his youth, and failed to obtain "adequate expert assistance" regarding Gregory Thompson's competency at the time Gregory Thompson made incriminating statements to state authorities.

In his federal habeas petition, Thompson averred that:

> Counsel was ineffective for failing to fully investigate and present relevant evidence of Mr. Thompson's mental health history, and to secure *adequate expert assistance to defend Mr. Thompson including psychologists, neuropsychological, and/or neurological experts to establish valid mitigating factors.* . . .
>
> . . .
>
> Counsel failed to obtain *adequate* expert assistance, including confidential *psychological, neuropsychological, and neurological experts.*

(Emphasis added.)

of Eastern Tennessee[22], consulted Faye Sultan, a psychologist, and Barry Crown, a neuropsychologist. It is with no small irony that we note that in attempting to claim that Thompson was constitutionally entitled to the services of a psychiatrist, post-trial counsel did not bother to obtain one themselves.

More fundamentally, even if the issue had been raised, Thompson did not establish that he was constitutionally entitled to expert psychiatric assistance under *Ake v. Oklahoma,* 470 U.S. 68 (1985), such that counsel's failure to attain one constituted ineffective assistance. In *Ake,* the Supreme Court held that, "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." *Ake,* 470 U.S. at 74, 83. The *Ake* court also stated that a similar conclusion was required in the context of a capital sentencing proceeding, when the state presents psychiatric evidence of the defendant's future dangerousness. *Id.* at 83. At the same time, the *Ake* majority emphasized that its ruling was limited to cases in which the defendant's mental condition was "seriously in question" upon the defendant's "threshold showing." *Id.* at 82. Furthermore, the Court held that the state was obliged merely to provide one competent psychiatrist, and that it could choose that psychiatrist. In other words, the defendant's right does not include the right to a psychiatrist of his choice. *Id.* at 83 ("That is not to say, of course, that the indigent defendant has a constitutional right to choose a

[22] We note that Thompson is represented by the same office in this appeal.

psychiatrist of his personal liking or to receive funds to hire his own.").

This Court has interpreted *Ake* to recognize that in addition to the right to a psychiatrist during the guilt phase, an indigent defendant is constitutionally entitled to "psychiatric or psychological" assistance during the sentencing phase "1) if the defendant's sanity was a significant issue during the trial, or 2) defendant is on trial for his life and the state first presents psychiatric evidence of future dangerousness." *Skaggs v. Parker,* 235 F.3d 261, 272 (6th Cir. 2000) (quotation omitted), *cert. denied,* 122 S. Ct. 322 (2001). Neither of these prerequisites apply to Thompson. Counsel dropped the defense after two separate mental evaluations found him competent. The State did not present psychiatric evidence at trial or at its case-in-chief at sentencing.[23] Nor has Thompson offered any evidence of legal insanity at the time of offense. Thus, trial counsel cannot be deemed ineffective for failing to obtain a psychiatrist.

In any event, trial counsel sought a psychiatric evaluation of Thompson, and the court ordered one. Under *Ake,* this is all Thompson would have been entitled to anyway. Although Parsons stated that he had no confidence in the conclusion rendered by MTMHI, Parsons' feeling is not proof of anything, and there is nothing in the state or federal record to undermine the evaluations rendered by MTMHI staff as to Thompson's competency at the time of the murder and at trial. As we stated in *Martin v. Mitchell,* 280 F.3d 594, 614 (6th Cir. 2002), *petition for*

[23] The state introduced a redacted portion of Thompson's evaluation at MTMHI though Watson, a rebuttal witness.

cert. filed, June 25, 2002 (No. 02-5185), "[w]e have never found counsel to be ineffective solely because the expert used was on the State payroll."

This leaves the issue that is properly before us, whether trial counsel failed to hire *adequate* expert assistance. As illustrated above, the record reflects that trial counsel investigated Thompson's mental health and that he received expert assistance to attempt to establish valid mitigating factors. The record shows that trial counsel were aware from the outset of Thompson's prior head injuries and inappropriate behavior, and that they investigated possible mental illness or defect. They requested a competency evaluation. Thompson was evaluated for thirty days by a team of experts. The MTMHI team found no mental illness, mental defect, or insanity. Counsel also had Copple, a clinical psychologist and former professor of psychology at Vanderbilt, evaluate Thompson. Copple found no evidence of mental illness.

On appeal, Thompson seeks to undermine Copple's testimony by casting him as an "industrial psychologist," and therefore somehow unqualified to make psychological evaluations.[24] Copple's trial testimony belies this diminution of Copple's abilities. Copple himself testified on direct and cross examination that he is a clinical psychologist, and that he did not hold himself out as an industrial psychologist. Although he performs vocational evaluations and evaluations for social security applicants, he stated

[24] The American Psychological Association describe industrial psychologists as follows: "Industrial/organizational psychologists apply psychological principles and research methods to the work place in the interest of improving productivity and the quality of work life." http://www.apa.org/students/brochure/subfields.html.

that the latter are not industrial psychology, but clinical psychology, from the standpoint of making a psychological evaluation of whether someone can continue working. Significantly, none of Thompson's experts faulted the testing that was performed.

Moreover, not one of Thompson's post-trial experts have opined that Thompson suffered from organicity or mental illness at the time of the crime or trial. Blair, Thompson's state post-conviction expert, also a clinical psychologist with ties to Vanderbilt, declined to give an opinion, stating simply that more information was needed. Significantly, she did not fault the testing procedures used by MTMHI or Copple, but merely stated that they were not extensive enough. Indeed, she performed many of the same tests. Similarly, neither Crown nor Sultan ever expressed an opinion that Thompson was mentally ill at the time of the crime. In fact, Crown stated that he was not asked to render such an opinion. *Cf. Mackey v. Dutton,* 217 F.3d 399, 409 (6th Cir. 2000) (holding that the petitioner failed to establish that an expert's testimony would have been favorable to his insanity defense because the expert's report failed to speak to the ultimate issue – legal insanity at the time the offenses were committed), *cert. denied,* 531 U.S. 1087 (2001). On the other hand, Crown found Thompson competent in June 1998, which is consistent with Copple's findings and the MTMHI evaluation in 1985.

Also, as the district court found, Thompson failed to submit any medical records or proof *to any court* that he actually sustained the alleged head injuries or that they resulted in any permanent damage. Further, he has never submitted *to any court* any proof that he suffered from severe mental illness at the time of the crime. Thompson

claims that trial counsel failed to discover his father had a history of severe mental illness, but Thompson have [sic] never offered any proof of this either.

Counsel has now had numerous opportunities via expert testimony to establish that Thompson suffered from organic brain disease or mental illness at the time of the crime. And yet, at each opportunity, counsel fails to secure an answer to the critical issue of whether Thompson was mentally ill at the time of the crime. In essence, counsel is attempting to rely on, *as proof,* two inferences: 1) because Thompson allegedly suffered head injuries, he must have suffered brain damage, and 2) because he is currently suffering from schizo-affective disorder, he must have been suffering from mental illness at the time of the crime. But inferences are not proof, as even Thompson's experts seem to recognize, for each and every one fails to automatically take the leap from these inferences to the conclusion that he was mentally incompetent at the time of the murder. However, absent some evidence of organic brain damage or mental illness at the time of the crime, trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist. As we held in *Lorraine v. Coyle,* 291 F.3d 416, 436 (6th Cir. 2002), "[i]t simply cannot be said that trial counsel's conduct fell below an objective standard of reasonableness under *Strickland* simply because the leads [of possible brain damage] led to nowhere."

Like trial counsel in *Lorraine,* Thompson's attorneys actually pursued a lead of organic brain damage or mental defect. Like counsel in *Lorraine,* "[t]hey cannot be deemed ineffective, since even at this late date, there is no medical *proof* of such a condition [at the time of the crime]." *Id.* at 439. *See also Martin,* 280 F.3d at 614-15 (rejecting the

petitioner's ineffective assistance at mitigation because the petitioner had not pointed to mitigating psychological evidence that should have been presented and therefore no prejudice was shown); *Campbell v. Coyle,* 260 F.3d 531 (6th Cir. 2001) (rejecting the petitioner's ineffective assistance at sentencing claim based on counsel's alleged failure to discover that he had post traumatic stress disorder because the petitioner failed to point to anything in the record showing that he suffered from it), *cert. denied,* 122 S. Ct. 1448 (2002). *Cf. Williams,* 529 U.S. at 395-98 (finding ineffective assistance where trial counsel failed to investigate and introduce available evidence showing that the petitioner was borderline mentally retarded); *Coleman v. Mitchell,* 268 F.3d 417, 449-53 (6th Cir. 2001) (finding ineffective assistance for failure to investigate and present available proof of the petitioner's borderline mentally retarded I.Q. and various psychological and hospital reports revealing that at the time of trial the petitioner had a borderline personality disorder), *cert. denied,* 122 S. Ct. 1639, (2002); *Glenn v. Tate,* 71 F.3d 1204, 1205 (6th Cir. 1996) (finding ineffective assistance of counsel where counsel failed to investigate and present evidence that the petitioner suffered from global brain damage sustained before he was born; stating that "[e]xpert testimony that the petitioner's brain function was organically impaired would have been readily available if the petitioner's lawyers had sought it").

Skaggs, in particular, demonstrates why Thompson failed to demonstrate cause. In that case, we found that trial counsel were ineffective at the penalty phase because they retained a fraudulent psychologist whose testimony was often incoherent and rambling and who failed to present a realistic view of the petitioner's mental status.

In several motions for a new trial, Skaggs offered the evaluations of two psychiatric experts who examined the petitioner in preparation for his federal habeas petition. *Skaggs*, 235 F.3d at 265. One of the experts, a certified psychologist, stated that Skaggs was mildly retarded and functioned at the level of a twelve- or thirteen-year-old. The other expert, a neuropsychologist, determined that Skaggs had an I.Q. of 64, which indicated that he was borderline mentally retarded. That expert also stated that the fraudulent psychologist's testimony was "'so far below the standard of care as to totally misrepresent Mr. Skaggs to the jury.'" *Id.* The neuropsychologist's report stated that Skaggs "suffer[ed] from significant compromise in almost all areas of cognitive function . . . and that the results of comprehensive neuropsychological assessment clearly reflect a pattern of results consistent with some form of organic brain syndrome." *Id.* at 273. This Court held that, based on this information, it was reasonable to assume that the jury might have found the statutory mitigating circumstance of Skaggs's impaired ability to appreciate the criminality of his conduct as a result of mental illness or retardation. *Id.* at 274. We therefore concluded that counsel's failure to present proof of Skaggs's mild mental retardation and mental capacity constituted prejudice because it was the one topic which may have convinced the jury that the death sentence was not justified. *Id.* at 271-72.

Carter is also instructive. There we found cause under *Strickland* based on trial counsel's failure to investigate, discover, and present mitigating evidence. At an evidentiary hearing in federal court, Carter presented evidence of mitigating circumstances that he alleged his trial counsel should have presented. This included evidence

that Carter's childhood home was violent and unstable, that his mother and sister were both hospitalized in mental health institutions, and that his IQ was 79-89. *Carter*, 218 F.3d at 593. Significantly, Carter also presented the evaluation of a clinical psychologist who, eight years after the murder at issue, determined that Carter had psychotic symptoms, and thought disorders consistent with paranoid schizophrenia or an organic delusional order, and further stated that "although Carter may have not appeared delusional to a lay-person at the time of his trial, a trained professional would have been able to recognize mental compromise and abnormal personality traits in excess of an antisocial personal disorder." *Id.* at 593-94.

By contrast, Thompson has not presented any evidence of incompetence at the time of the crime or trial in either the state or federal proceedings. As previously noted, none of Thompson's experts have stepped up to the plate on the key issue of Thompson's competence at the time of trial.

As the Tennessee Court of Criminal Appeals held, there is no prejudice because, "[t]he petitioner has failed to establish that the head injuries had any effect upon his mental stability at the time of the murder. Further, he has failed to establish that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Thompson*, 958 S.W.2d at 165. Moreover, as the foregoing litany of cases shows, this Court will not find ineffective assistance of counsel unless the record establishes that there is actual mitigating evidence that was not presented.

Indeed, although the state court ruled on the prejudice prong of *Strickland,* its ruling is equally sustainable under the cause prong of *Strickland* because trial counsel's decision to employ a clinical psychologist at trial was not objectively unreasonable. Further, as the Tennessee Court of Appeals concluded, "counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id.* Nor can there be prejudice, because the jury was not deprived of any *actual evidence* of organicity or mental disease or defect at the time of the crime. Thus, the state court's decision holding that counsel were not ineffective under the Sixth Amendment is not an unreasonable application of *Strickland.*

2. Witness Testimony

Thompson also contends that counsel failed to interview and present testimony of witnesses who could have testified about a "bizarre change" in Thompson's behavior after he graduated from high school that might have signaled the onset of mental illness and to otherwise present his personal and social history. Specifically, Thompson claims that trial counsel failed to interview and call as witnesses Nora Jean Walton, Joanne McNamara, and Arlene Cajulao.[25] Thompson failed to properly present these claims in the state post-conviction proceedings. The Tennessee Criminal Court of Appeals found:

[25] In his brief Thompson recites what these witnesses "would have testified" to had counsel "conducted a proper social history." This purported testimony is unsupported by any record proof, and violates Fed. R. App. 28.

> When the claim of ineffectiveness is predicated upon the failure to present potential witnesses, their testimony should be offered at the post-conviction hearing. . . . Here, because none of the witnesses testified at the hearing, the petitioner was simply unable to show prejudice. We cannot speculate upon the usefulness of these witnesses without the information they could have provided.

Thompson, 958 S.W.2d at 163-64. Thompson further failed to submit affidavits from witnesses who could have testified to his alleged "bizarre behavior" in his federal habeas action. Thus, "Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute." The state court did not err in concluding that Thompson failed to state an ineffective assistance of counsel claim on this basis, and the district court properly granted summary judgment. *Cf. Martin,* 280 F.3d 594.

Although Cajulao testified, Thompson claims that she was not informed about the nature of the penalty phase testimony and only testified about things she felt would help Thompson. However, as the record reflects and the Tennessee Criminal Court of Appeals found, counsel were aware of the potential dangers inherent in allowing Cajulao to testify, but made a tactical decision to present her positive testimony as part of their strategy to "humanize" Thompson. The state court's ruling is not an unreasonable application of *Strickland,* which emphasized that courts are not to second-guess strategic decisions by counsel.

The record reflects that counsel conducted an adequate investigation into Thompson's background. Prior to

trial, both counsel traveled to Thompson's home town. They interviewed relatives, teachers, and neighbors. Counsel knew of Thompson's head injuries and followed up by requesting and obtaining expert assistance. Although they did not obtain his medical records, Watson and Copple were each aware of these injuries prior to his evaluation of Thompson. (Apparently habeas counsel never obtained the records either.) Through the lay witnesses, the jury was provided with an image of Thompson as a caring, good person. *Cf. Greer v. Mitchell,* 264 F.3d 663, 676-78 (6th Cir. 2001) (finding ineffective assistance of appellate counsel for failing to raise ineffective assistance of trial counsel where trial counsel failed to interview family members, failed to review school records, and failed to call any mental health experts; and cases cited therein), *cert. denied,* 122 S. Ct. 1323 (2002).

Moreover, to the extent that Thompson faults counsel for not presenting evidence of "bizarre" behavior, it should be noted that Cajulao testified to Thompson's increasing paranoia and erratic behavior after the crowbar attack. The jury was therefore given some indication that the head injuries may have affected Thompson's behavior. There is no prejudice.

3. Strategy

Thompson claims that trial counsel adopted a completely indefensible strategy of presenting Thompson as a good, caring person with a need to "nurture." We disagree. In this case, trial counsel were faced with a client who had committed a senseless crime and admitted to it. Further, his upbringing had been fairly normal. *Cf. Bell,* 122 S. Ct. at 1847-53 (holding that counsel decision not to present

any mitigating evidence at sentencing and thereby preventing the prosecutor from presenting any rebuttal was not deficient under *Strickland* because counsel was "faced with the formidable task of defending a client who had committed a horribly brutal and senseless crime," who had admitted to the killing, and who had a relatively normal upbringing). Nor could they present evidence of mental illness or defect. As the Tennessee Court of Criminal Appeals held, trial counsel could have pursued a strategy other than emphasizing his good qualities, and prevented the state from introducing some negative evidence about him. But there is no indication that another strategy would have been more effective, and the failure to present evidence of Thompson's prior good behavior might itself qualify as ineffective assistance. *Cf. Cone v. Bell,* 243 F.3d 961, 977-79 (6th Cir. 2001) (holding that counsel's failure to present any mitigating evidence or to ask the jury to spare the defendant's life constituted ineffective assistance, reversing death sentence); *rev'd* 122 S. Ct. 1843 (2002) (holding that counsel could have told jury of the defendant's Bronze Star decoration in Vietnam and his expression of remorse, but such strategy did not so clearly outweigh counsel's choice to waive oral argument to prevent lead prosecutor from arguing that it could be deemed objectionably unreasonable under *Strickland*).

Thus, as long ago cautioned in *Strickland,* and recently reemphasized in *Bell,* an attorney's conduct is entitled to a strong presumption that it falls within a wide range of reasonable professional assistance. *Bell,* 122 S. Ct. at 1854. As in *Bell,* "[g]iven the choices available to [Petitioner's] counsel . . . we cannot say that the court's application of *Strickland's* attorney-performance standard was objectively unreasonable." *Id.*

C. Evidentiary Hearing

Thompson asserts that the district court erred in denying his petition without an evidentiary hearing on three specific claims: (1) ineffective assistance of counsel; (2) competency at the time of the offense to stand trial, and (3) an alleged *Brady/Giglio* violation. Thompson further contends that the State withheld exculpatory evidence which clearly supported his claim of serious mental illness and presented false evidence regarding Thompson's mental health, during trial and post-conviction proceedings.

The AEDPA imposes express limitations on the ability of a petitioner to obtain an evidentiary hearing in federal court. In *(Michael Wayne) Williams v. Taylor,* 529 U.S. 420 (2000), the Supreme Court instructed that a habeas court presented with a request for an evidentiary hearing must first ascertain whether the "applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2); *Williams,* 529 U.S. at 433 (interpreting clause as evidencing congressional intent to codify standard of diligence announced in pre-AEDPA decision, *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992)). If the applicant did not "fail to develop" the claim in state court, the statute does not bar an evidentiary hearing. If an "applicant has failed to develop the factual basis of a claim in State court proceedings," 28 U.S.C. § 2254(e)(2) prohibits a federal court from conducting an evidentiary hearing on that claim unless the applicant demonstrates that

> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

The test for "fail to develop" is defined as a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel" in his or her attempts to discover and present a claim in state court proceedings. *Williams,* 529 U.S. at 432. Diligence, for purposes, of § 2254(e)(2), depends upon "whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.* at 435.

Thompson claims that the district court erred in denying him an evidentiary hearing because he did not fail to develop the factual basis of his claims in state court. Thompson claims that he made diligent efforts to develop the fact of his claims in state court "by requesting resources to conduct an investigation and resources to obtain expert assistance and by requesting an evidentiary hearing in state court." He claims that he was denied funding for mental health experts and investigative services at trial and during state post-conviction proceedings and argues that fault for any deficiency in the state court record belongs to the State.

Even if we assume that Thompson did not "fail to develop" these claims below (and we do not make that

assumption), Thompson is still not entitled to an evidentiary hearing under § 2254(e) because he failed to present any evidence demonstrating a genuine issue of material fact as to his claim of incompetence at the time of the offense and at trial. This is true even though the district court granted him further discovery under Habeas Rule 6. Absent such a showing, there can be no cause or prejudice under *Strickland* and therefore no need for an evidentiary hearing. *Cf. Hutchison v. Bell*, ___F.3d___, 2002 WL 1988196, at *8 (6th Cir. Aug. 29, 2002) (holding that the petitioner failed to develop the factual basis for his claims and that absent a record of the evidence that he would have presented at a separate trial, it was impossible to conclude that the state court unreasonably determined that he was not prejudiced). Furthermore, if Thompson did fail to develop, his failure to point to actual mitigating evidence that should have been presented, i.e. his failure to show prejudice, establishes that he has not met the requirement of § 2254(e)(2)(B). *See Martin*, 280 F.3d at 615.

Finally, concerning an alleged *Brady/Giglio* violation, Thompson failed to identify below, or in this court, any evidence that was withheld from him at trial.

In short, Thompson's argument is without merit. We therefore affirm the district court's holding, and specifically adopt the reasoning of the district court as to these claims.

IV. Conclusion

For all of the foregoing reasons, the judgment of the district court denying Thompson's petition for writ of habeas corpus is **AFFIRMED**.

CONCURRENCE

KAREN NELSON MOORE, concurring in the result. I concur in the court's decision to affirm the district court's denial of Thompson's petition for the writ of habeas corpus. However, I write separately to state that in regard to Thompson's claim that his counsel was constitutionally ineffective at sentencing, I reach the decision to deny his petition solely on the basis of the facts in this case.

Thompson claims that his trial counsel was constitutionally ineffective in presenting mitigating factors at his sentencing because his counsel did not present appropriate psychological evidence of his mental condition. Both Thompson and the dissent contend that had Thompson's trial counsel hired a more appropriate psychological or psychiatric expert, they would have been able to present evidence of Thompson's mental illness, or at least of his deteriorating mental condition. While I have sympathy for the view expounded in the dissent regarding the general propriety of using industrial psychologists as expert witnesses in capital cases, I cannot conclude that Thompson's trial counsel was constitutionally ineffective in hiring Dr. Copple in this case because Thompson has presented no evidence that his counsel knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime. Without any evidence that a more appropriate psychological or psychiatric expert would have testified to Thompson's mental illness or his deteriorating mental condition, I cannot conclude that the hiring by Thompson's trial counsel of Dr. Copple – however flawed

his testimony seems in hindsight – constituted constitutionally ineffective assistance of counsel.

DISSENT

CLAY, Circuit Judge, dissenting. Because the state court's conclusion that Thompson's trial counsel were not constitutionally ineffective was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), I would reverse the district court's judgment granting summary judgment to Warden Bell and remand to the district court with instructions to issue a writ of habeas corpus vacating Thompson's death sentence unless the State of Tennessee conducts a new penalty trial proceeding within 180 days of remand.

I. Standard of Review and Governing Law

I agree with the lead opinion that Thompson's habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, as amended Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), 28 U.S.C. § 2254(d). AEDPA provides that an application for a writ of habeas corpus on behalf of an individual incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the

state court proceeding." 28 U.S.C. § 2254(d). In *Williams v. Taylor*, 529 U.S. 362 (2000), the United States Supreme Court interpreted this provision of AEDPA to require a federal court to find a violation of law "clearly established" by holdings of the Supreme Court as of the time of the relevant state court decision. The Supreme Court in *Williams* held that a state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 413. The Court also stated that a decision by a state court will be deemed an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.; see also Bell v. Cone*, 535 U.S. 685, ___, 122 S. Ct. 1843, 1850 (2002).

In *Williams*, the Court held that the petitioner was entitled to federal habeas corpus relief on his claim that he was denied his constitutionally guaranteed right to the effective assistance of counsel when his trial attorneys did not investigate and present substantial mitigating evidence during the sentencing phase of his capital murder trial. 529 U.S. at 396. In particular, the Court found that while trial counsel were competent during the guilt phase of the trial, they rendered ineffective assistance at the sentencing phase by their failure to investigate "Williams' nightmarish childhood" and to present evidence that "Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school" or concerning his commendable behavior in prison. *Id.* at 395-96. Because

Williams "raised 'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence," the Court in *Williams* concluded that "the Virginia Supreme Court rendered a 'decision that was clearly contrary to, or involved an unreasonable application of, clearly established Federal law,'" thus entitling Williams to habeas relief. *Id.* at 399.

In the matter at hand, Thompson also claims that he was entitled to habeas corpus relief, principally because he was denied the effective assistance of counsel under the Sixth Amendment of the United States Constitution.[1] Claims of ineffective assistance of counsel are governed by the Supreme Court's two-prong test set forth in *Strickland.* The first prong of the test is whether counsel's performance fell below an objective standard of reasonableness, whereby "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687. Review of trial counsel's performance is highly deferential. *Id.* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the

[1] The lead opinion's contention that Thompson procedurally defaulted his claim that trial counsel were ineffective because they failed to hire a psychiatrist instead of a psychologist is unsupported inasmuch as this claim is inherently implied by Thompson's petitions for relief. More importantly, however, trial counsel's failure to hire any competent psychological assistance whatsoever provides a basis for granting Thompson relief, as will be demonstrated.

time." *Id.* In this regard, defense counsel must reasonably investigate the facts of the case or reasonably determine that an investigation is not necessary, or else the performance is deficient. *Austin v. Bell,* 126 F.3d 843, 848 (6th Cir. 1997). In addition, as this Court pointed out in *Combs v. Coyle*, 205 F.3d 269, 289-90 (6th Cir. 1997),

> *Strickland* instructed that "[p]revailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.63(2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable, but they are only guides." *Strickland*, 466 U.S. at 688, 104 S. Ct. 2052. ABA Standard 4-1.2(c) states that "[s]ince the death penalty differs from othr criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making *extraordinary* efforts on behalf of the accused." ABA Standards for Criminal Justice Prosecution Function and Defense Function 120 (3d ed. 1993). (Emphasis supplied).

The second prong of the *Strickland* test is whether counsel's error materially prejudiced the defendant. Under this prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. In *Strickland,* the Supreme Court explained:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting

> guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695. In *Skaggs v. Parker,* 235 F.3d 261 (6th Cir. 2000), this Court further noted that "[t]he Court recently emphasized that a petitioner need not prove by a preponderance of the evidence that the result would have been different, but merely that there is a reasonable probability that the result would have been different." *Id.* at 271 (citing *Williams,* 529 U.S. at 362).

Both prongs of the *Strickland* test involve mixed questions of law and fact, and we review both the state court and district court determinations *de novo. Carter,* 218 F.3d at 591. "As a federal court reviewing a state criminal judgment, we do not consider a state court conclusion that counsel rendered effective assistance to be a fact binding on us." *Id.* (citing *Strickland,* 466 U.S. at 698). Because the Tennessee state court correctly stated the *Strickland* standard, the question before us is whether the state court's decision was an unreasonable application of the standard set by the Supreme Court for evaluating claims of ineffective assistance of counsel.

II. Analysis

A. Counsel's Trial Strategy was Unreasonable

This Court's recent death penalty jurisprudence indicates that we have not been reluctant to find ineffective

assistance of counsel in capital cases where there was no strategy at all or where the strategy was so completely ill-conceived as to be objectively unreasonable, especially when trial counsel fails to develop or present mitigating evidence at the sentencing phase. *See Coleman v. Mitchell,* 268 F.3d 417, 449-53 (6th Cir. 2001) (finding that counsel was ineffective for failing to investigate and present mitigating evidence regarding the petitioner's personal background, psychological history and potential organic brain dysfunction at the penalty phase); *Skaggs,* 235 F.3d at 266-75 (finding that while counsel was not ineffective during the guilt phase for failing to investigate the credentials of a fraudulent "psychologist," counsel was ineffective because he failed to find a different psychiatric expert as his central mitigation witness at the penalty phase and because counsel essentially provided no legitimate mitigating evidence at sentencing); *Carter,* 218 F.3d at 594-600 (concluding that counsel's failure to investigate the petitioner's family, social or psychological background and present mitigating evidence at the sentencing phase amounted to ineffective assistance of counsel, "constitut[ing] deficiencies so severe as to dispense with the need to establish prejudice"); *Combs,* 205 F.3d at 287-88 (finding defense counsel's failure to question his only expert witness about his opinion regarding whether the petitioner lacked the requisite intent to commit the crimes before putting him on the stand at the culpability phase was "inexcusable" and "objectively unreasonable," amounting to ineffective assistance of counsel where the expert's testimony that petitioner did not lack the requisite intent "contradicted the sole defense theory" and "was completely devastating to the defense"); *Rickman v. Bell,* 131 F.3d 1150, 1159-60 (6th Cir. 1997) (ruling that trial counsel's portrayal of his client as "vicious and abnormal," labeling

him as "nuts" and "just ... out of somebody's insane asylum," was not a legitimate trial strategy, depriving his client of the effective assistance of counsel); *Groseclose v. Bell,* 130 F.3d 1161, 1169-71 (1997) (holding that trial counsel's failure to have "any defense theory whatsoever" was, among other shortcomings, "especially appalling," amounting to ineffective assistance of counsel); *Austin,* 126 F.3d at 848-49 (holding that trial counsel's failure to investigate and present any mitigating evidence during the sentencing phase "because he did not think that it would do any good" constituted ineffective assistance of counsel since "this reasoning does not reflect a strategic decision, but rather an abdication of advocacy"); *Glenn v. Tate,* 71 F.3d 1204, 1207-11 (6th Cir. 1995) (finding that petitioner was denied the effective assistance of counsel during the sentencing phase as a result of counsel's failure to develop and present mitigation evidence regarding the petitioner's history, background and organic brain damage, noting that "[i]t was not that such information could not be found, or that counsel made a reasoned decision to withhold the information for tactical or strategic reasons").

The case before us fits squarely within this line of cases in which counsel's failure to have a reasonable trial strategy in a capital case constitutes ineffective assistance of counsel. Specifically, trial counsel's decision to apply the court-ordered funds, granted in a motion filed pursuant to *Ake v. Oklahoma,* 470 U.S. 68, 83 (1985), to hire an industrial psychologist lacking the requisite professional background for the task at hand was simply not an "objectively reasonable" strategy in this case. Thompson's trial attorneys' failure to hire an appropriate psychiatric expert determined their purported trial strategy throughout this entire case. As a result, Thompson's trial attorneys failed

to present any legitimate mitigating evidence at the penalty phase of the trial. The consequence of trial counsel's thoroughly unreasonable trial strategy is that there can be no confidence in the reliability of the state court's death sentence.

As indicated, Thompson's trial attorneys at the commencement of the proceedings in the state trial court moved for funds to hire a psychiatric expert pursuant to *Ake* because they questioned the reliability of the psychiatric evaluation of the forensic team at Middle Tennessee Mental Health Institute ("MTMHI"). Trial counsel filed this motion for court-ordered funding because Thompson's mental status was in issue after he was charged in this case, he was going to be on trial for his life, and the state was going to present evidence of his future dangerousness. Presumably because Thompson made a threshold showing for psychiatric assistance under *Ake,* the trial court granted his motion for court-ordered funds to hire his own psychiatric expert to assist in his defense and to respond to the state's psychiatric experts.

In *Ake,* the Supreme Court held that, under the Due Process Clause of the Fourteenth Amendment, an indigent defendant has the right to expert psychiatric assistance upon a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial. As the Supreme Court explained, an indigent defendant, at a minimum, is entitled to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. *Ake* also held that, when appropriate, the right to expert assistance applies to the sentencing phase of capital proceedings. *Id.* at 86. In doing so,

the Court emphasized the pivotal role that a psychiatric expert has come to play in such proceedings:

> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

* * *

> By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them.

Ake, 470 U.S. at 80-81 (citations omitted).

In this case, the trial court granted the defense's request for funds to hire a "private psychiatrist . . . for the purpose of affording counsel the benefit of private expert psychiatric consultation in regards to the defendant . . . to ensure that the constitutional rights of the defendant are properly protected." (J.A. at 24.) Although Thompson was provided with access to psychiatric assistance, as required by the Due Process Clause under *Ake*, his trial counsel took it upon themselves to hire an industrial psychologist who did not possess the proper professional qualifications necessary to respond to the state's mental or psychological examination of Thompson or to assist the defense. In failing to hire an appropriate psychiatric expert, and instead hiring Dr. Copple, an industrial psychologist, Thompson's trial counsel eviscerated Thompson's constitutional entitlement under *Ake* of any effective content. Thompson's trial counsel's alleged explanation for hiring Copple was that they could not find a psychiatrist in Nashville since the psychiatrist they ordinarily used had moved out of state.[2] In effect, Thompson's trial counsel's

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[2] The lead opinion's attempt to characterize Dr. Copple as a clinical psychologist as opposed to an industrial psychologist by virtue of Dr. Copple's self-serving description is unpersuasive. Despite the professional label that Dr. Copple chose for himself, the fact remains that by

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decision to hire Dr. Copple, stripped their client of his constitutional right to access to an appropriate psychiatric expert, nullifying the protections provided by the Due Process Clause. *See Starr v. Lockhart,* 23 F.3d 1280, 1289 (8th Cir. 1994) (noting that "[a]s *Ake* explains, due process requires access to an expert who will conduct, not just any, but an appropriate examination," and finding that the petitioner's "exam was inappropriate because it did not delve into the mitigating questions essential to [the petitioner]"); *Smith v. McCormick,* 914 F.2d 1153, 1158-59 (9th Cir. 1990) ("[U]nder *Ake* . . . [the defendant] was entitled to his own competent psychiatric expert."). In short, Thompson's constitutional entitlement under *Ake* was rendered meaningless by his counsel's failure to hire an expert qualified to provide the psychiatric or psychological assistance necessary on the pertinent issues of Thompson's case.

As the trial record clearly shows, Dr. Copple did not have the requisite knowledge and training to provide the sort of expert assistance necessary to protect Thompson's constitutional rights. Simply put, Dr. Copple lacked the medical expertise to be a qualified witness in Thompson's

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definition, Dr. Copple is an industrial psychologist inasmuch as he specializes in the evaluation of Social Security applicants who allegedly suffer from psychological disorders which prevent the applicants from performing work in the national economy, and in "vocational evaluations" which are used to assist individuals in achieving their vocational goal. *See* STEDMAN'S MEDICAL DICTIONARY 1165 (27th ed.2000) (defining "industrial psychologist" as a licensed psychologist who specializes in "the application of the principles of psychology to problems in business and industry"). Significantly, Dr. Copple in no way could be characterized as a forensic psychologist. *See id.* (defining "forensic psychologist" as a licensed psychologist who specializes in "the application of psychology to legal matters in a court of law"); *see also infra* note 5.

behalf and to rebut the state's psychiatric evaluation performed by the team of forensic psychiatrists and psychologists at MTMHI. Specifically, as an industrial psychologist specializing in Social Security and vocational evaluations, Copple lacked the specialized knowledge, skill, experience, and training to function as a qualified witness in this capital case where a forensic psychologist or psychiatrist was needed to provide a psychological basis for Thompson's behavior in order to show that he was mentally impaired.

As a matter of fact, industrial psychologists generally, and Dr. Copple in particular, are not up to the task of functioning as forensic psychologists in capital cases. As described by the Society for Industrial and Organizational Psychology (SIOP),

> **Industrial-Organizational Psychologists are Versatile Behavioral Scientists Specializing in Human Behavior in the Work Place.**
>
> Industrial-organizational (called I-O) psychologists recognize the interdependence of individuals, organizations, and society, and they recognize the impact of factors such as increasing government influences, growing consumer awareness, skill shortages, and the changing nature of the workforce. I-O psychologists facilitate responses to issues and problems involving people at work by serving as advisors and catalysts for business, industry, labor, public, academic, community, and health organizations:
>
> They are:
>
> ◊ Scientists who derive principles of individual, group, and organizational behavior through research;

- ◊ Consultants and staff psychologists who develop scientific knowledge and apply it to the solution of problems at work; and
- ◊ Teachers who train in the research and application of industrial-organizational psychology.

http://www/sip.org/TIP/SIOP/brochure.html.[3] The American Psychological Association provides a similar definition, stating that "industrial/organizational psychologists apply psychological principles and research methods to the work place in the interest of improving productivity and the quality of work life." http://www.apa.org/students/brochure/subfields.html.[4]

[3] SIOP, Division 14 of the American Psychological Association and an organizational affiliate of the American Psychology Society, states that its purpose is to study and promote human performance in organizational and work settings, and is perhaps the most authoritative source in this country for information about the nature and expertise of industrial-organizational (I-O) psychologists.

[4] These descriptions of I/O psychologists are generally accepted by psychologists. For example, the MacMillan Dictionary of Psychology defines "industrial psychology" as "[t]he psychological study of all aspects of work and of the working environment, and the application of psychological findings to improving efficiency and contentment at work, through e.g. better selection methods, improved design of machinery, improved training, or improved organizational and management strategies." MACMILLAN DICTIONARY OF PSYCHOLOGY (2d ed.1995); *see also* THE DICTIONARY OF PSYCHOLOGY (1999) (Defining "industrial-organizational psychology" as "[t]he application of psychological theory and methods to industrial and organizational problems having to do with a person's self, others, job, machines, operations, etc. as well as to improving selection of personnel and work procedures, all in the interest of establishing a productive and happy climate in a variety of shops, agencies, and organizations, as well as enhancing profit"). As explained in the Baker Encyclopedia of Psychology & Counseling:

> "[a]reas of specialization within I/O psychology include personnel (industrial) psychology (selection) and hiring,

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The professional goals and expertise of industrial psychologists thus differ markedly from those of forensic psychiatrists or psychologists. As described by the American Academy of Psychiatry and Law ("AAPL"), "forensic psychiatry is a medical subspecialty that includes research and clinical practice in the many areas in which psychiatry is applied to legal issues," including criminal responsibility and criminal competence. http://www.emory.edu/AAPL/org.htm. Similarly, the American Board of Forensic Psychology, which is part of the American Board of Professional Psychology, defines "forensic psychology is the application of the science and profession of psychology to questions and issues relating to the law and legal system." The practice of forensic psychology includes, in pertinent part, "psychological evaluation and expert testimony regarding criminal forensic issues such as trial competency, waiver of Miranda rights, criminal responsibility." http://www.abfp.com/brochure.html.[5] An even more specific

> training, and performance appraisal). BAKER ENCYCLOPEDIA OF PSYCHOLOGY & COUNSELING 619 (2d ed.1999); *see also* 4 ENCYCLOPEDIA OF PSYCHOLOGY 252-63 (2000) (discussing industrial and organizational psychology in three articles about the history of the field, its principle theories and the assessments and interventions used in the field).

[5] In describing forensic psychiatry, the Baker Encyclopedia of Psychology & Counseling states:

> Forensic psychiatry is a branch of forensic medicine, the science that deals with the application of medical facts to legal problems. The term medico-legal refers to a contrasting distinction, a branch of law that deals with the application of legal principles to medical and psychiatric problems. Forensic psychiatry and medico-legal psychiatry are used interchangeably and while "forensic psychiatry" has a specific meaning, it is generically used to denote the interface shared by psychiatry and the law.

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definition of forensic psychology has been adopted by the American Psychological-Law Society, Division 41 of the American Psychological Association. Specifically, Section 1(B)(1) of The Speciality Guidelines for Forensic Psychologists provides:

> B. Scope
>
> 1. The Guidelines specify the nature of desirable professional practice by forensic psychologists, within any subdiscipline of psychology (e.g. clinical, developmental, social, experimental) when engaged regularly as forensic psychologists.

BAKER ENCYCLOPEDIA OF PSYCHOLOGY & COUNSELING, *supra* at 464. Similarly, "forensic psychology" is defined by the MacMillan Dictionary of Psychology to be "[a] branch of applied psychology that studies and makes practical suggestions about the working of the law." The Dictionary of Psychology also defines "forensic psychology" generally as "[t]he application of psychological principles and techniques in law, including the evaluation of testimony, functions of the expert witness, methods of interrogation, guilt detection, legal policies, diagnosis and therapy, and general assistance in a variety of problems." As explained in the Baker Encyclopedia of Psychology & Counseling:

> The role and function of a psychologist in a court setting can involve pretrial, trial and posttrial tasks. The pretrial question of competency of the defendant to cooperate with the attorney and understand the charges is usually determined by a combination of clinical interviews and tests such as intelligence tests, projective tests and tests for literacy.
>
> The psychologist may also be asked to determine the state of the defendant's mind at the time of the crime. This is a rather controversial aspect of the competency evaluation because the psychologist is asked to determine the defendant's mental state not at the time of the evaluation but at some previous time.

BAKER ENCYCLOPEDIA OF PSYCHOLOGY & COUNSELING, *supra* at 467.

> a. Psychologist" means any individual whose professional activities are defined by the American Psychological Association or by regulation of title by state registration or licensure, as the practice of psychology.
>
> b. *"Forensic psychology" means all forms of professional psychological conduct when acting, with definable foreknowledge, as a psychological expert on explicitly psycholegal issues,* in direct assistance to courts, parties to legal proceedings, correctional and forensic mental health facilities and administrative, judicial, and legislative agencies acting in an adjudicative capacity.
>
> c. *"Forensic psychologist" means psychologists who regularly engage in the practice of forensic psychology as defined in I(B)(1)(b).*

The Speciality Guidelines for Forensic Psychologists at http://www.unl.edu/ap-ls/links.htm (15 Law and Human Behavior 657 (1991)) (emphasis added). The Speciality Guidelines for Forensic Psychologists further provide:

> III. COMPETENCE
>
> A. *Forensic psychologists provide services only in areas of psychology in which they have specialized knowledge, skill, experience, and education.*
>
> B. Forensic psychologists have an obligation to present to the court, regarding the specific matters to which they will testify, the boundaries of their competence, the factual bases (knowledge, skill, experience, training, and education) for their qualification as an expert, and the relevance of those

> factual bases to their qualification as an expert on the specific matters at issue.

Id. at 658 (emphasis added).

Turning to the present case, it was simply indefensible for Thompson's trial counsel to use the court-ordered funds designated for hiring a forensic psychiatrist to select Dr. Copple as their expert witness. Dr. Copple was not a forensic psychiatrist or even a general psychiatrist, nor was he a forensic psychologist. Rather, Dr. Copple's speciality involved psychological evaluations of Social Security applicants with problems that prevent them from working and "vocational evaluations," which are used for "helping people reach their vocational goals or choosing vocational goals." Although Dr. Copple was licensed to practice psychology in Tennessee, pursuant to Tenn.Code Ann. § 63-11-203, he clearly lacked the knowledge, skill, experience and training to function as a forensic psychologist in a capital murder case, as defined in I(B)(1)(b) of The Speciality Guidelines for Forensic Psychologists. Dr. Copple had never testified in a capital case and had not testified in a criminal case in years. Moreover, Thompson's trial counsel admitted that Dr. Copple was not an expert in criminal behavior. Thus, by their own admission, Thompson's trial counsel concede that Dr. Copple would not have been competent to function as a forensic psychologist, if the Speciality Guidelines for Forensic Psychologists had been in effect at the time of the trial, since he did not regularly engage in the practice of forensic psychology.

Further, had Rule 702 of the Tennessee Rule of Evidence, which tracks the federal rule, been applicable to this case, Dr. Copple would not have been qualified as an

expert witness in forensic psychology under the criteria of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1992) since adopted by Tennessee Supreme Court in *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997). Indeed, what Thompson needed at the sentencing phase of the trial was not an industrial psychologist opining about whether Thompson would "thrive" in prison, but a qualified expert who would help him escape the death penalty by giving testimony about his mental condition so as to convince the jury that the mitigating circumstances outweighed the aggravating factors. Contrary to the lead opinion's claim, given Dr. Copple's background and practice as an industrial psychologist, he simply was not qualified to be an expert in this case.

The present case is quite analogous to *Skaggs v. Parker,* 235 F.3d 261, 266-75 (6th Cir. 2000). There, this Court found that counsel was ineffective for failing to replace a fraudulent "psychologist" with a different expert witness as his central mitigation witness at the penalty phase and for essentially providing no legitimate mitigating evidence at sentencing. Dr. Copple is the functional equivalent of the fraudulent psychologist in *Skaggs* since he was not competent to function as a forensic psychologist in a capital murder case and since Dr. Copple's testimony actually made things worse for Thompson. Because Thompson's counsel failed to hire a proper expert, they were not able to introduce evidence of his mental impairment, relying upon the totally implausible notion of presenting his "positive qualities and reservoir of moral upbringing" as mitigating circumstances. Thus, as in *Skaggs,* trial counsel essentially failed to present legitimate mitigating evidence at the sentencing phase.

The failure to hire an appropriate psychiatric expert had dire consequences for Thompson, dictating his attorneys' purported trial strategy throughout this entire case. It is no exaggeration to say that the decision to hire Dr. Copple was the single most important decision that Thompson's trial counsel made in this case, determining their ensuing trial strategy, which yielded their idea of presenting Thompson's "positive qualities and reservoir of moral upbringing" given the alleged dearth of evidence about Thompson's mental condition as uncovered by Dr. Copple. Without an appropriate expert, Thompson was not able to present mitigating evidence about his mental condition to rebut the conclusions of Dr. Watson and the forensic team at MTMHI that Thompson was malingering mental illness. However, according to the testimony of Dr. Blair at the state post-conviction hearing, three psychiatrists who treated Thompson from 1985 to 1990 reached far different conclusions about Thompson's mental condition than those of the forensic psychiatric team at MTMHI. Dr. Crown similarly opined that Thompson suffered from some form of organic brain damage, which was secondary to a "schizo-affective disorder, bipolar subtype." Despite the fact that Thompson had suffered head injuries before the murder and experienced serious mental problems since incarceration, his trial attorneys, as a result of their failure to obtain the services of an appropriate psychiatric expert, were not in a position to develop this information. In view of Dr. Copple's professional background, then, there should be considerable doubt as to how much weight, if any, should be accorded Dr. Copple's concurrence with Dr. Watson and the forensic team at MTMHI that Thompson did not suffer from any mental illness.

In short, Thompson's trial counsel were hamstrung right from the start by their inability to respond to the state's psychiatric expert, since, without expert psychiatric assistance, they could not present proof of Thompson's mental problems, which may have provided a defense to the charges against him at the guilt phase or which could have constituted mitigating evidence at the penalty phase. It is precisely at this point that an appropriate psychiatric or psychological expert witness may have provided to the members of the jury the requisite medical testimony about Thompson's mental condition such that the jurors would have recommended that Thompson's life be spared. Specifically, it was the abject failure of Thompson's expert witness, as directed by his counsel, to present effective evidence of his mental problems that prejudiced him because it deprived him of any chance of convincing the jury to recommend a penalty short of the death sentence. Had Thompson been examined by a qualified psychologist or psychiatrist who had the appropriate expertise to be an effective witness, there is a substantial likelihood that the sentencing result in this case would have been different. Under the circumstances, it is fairly obvious that trial counsel's decision to apply the court-ordered funds to hire Dr. Copple was simply not an "objectively reasonable" strategy because Dr. Copple was not in the position to provide the kind of expert psychiatric assistance required by the Due Process Clause.

Given the absence of evidence in the form of expert testimony supporting Thompson's claim that he suffered from an adverse mental condition, his trial attorneys thus adopted, as if by default, the strategy of offering no defense in the guilt phase, while presenting Thompson's "positive qualities" as mitigating circumstances in the

penalty phase of this case. As trial counsel Richardson put it, he and his co-counsel called upon Dr. Copple to accentuate defendant's "positive moral qualities and reservoir of moral upbringing," as opposed to any "negative" evidence regarding defendant's mental condition. Thus, at the penalty phase, trial counsel offered Dr. Copple's testimony that Thompson is a sensitive, caring person who has "an exaggerated need for nurturance" or, alternatively, "an unusually strong need for what we call nurturance." In the context of this case, though, the idea that Thompson had "an unusually strong need for what we call nurturance" is baffling to the point of being incomprehensible insofar as explaining his alleged brutal murder of a woman or offering mitigating evidence for his sentence are concerned. Moreover, by presenting testimony at the penalty phase that Thompson had a need to "nurture," that he came from a "loving family," had a good reputation, and was "pleasant, easy-going and cheerful" before joining the Navy in 1979, his trial attorneys, in effect, condemned him to death, allowing the jury to infer that Thompson had absolutely no excuse for committing such a heinous crime. Thus, rather than present the jury with sympathetic evidence that might have tended to reduce the degree of Thompson's moral culpability or make him appear to be a more sympathetic figure in the eyes of the jurors, trial counsel, through their completely indefensible trial strategy, achieved exactly the opposite result at the penalty phase.

On appeal, Thompson argues that his counsel's strategy of presenting Thompson's "positive qualities" at the penalty phase also backfired, opening the door to the prosecution's elicitation of evidence about defendant's violent proclivities. In this regard, Thompson claims that

his ex-girlfriend, Ms. Cajulao, could have testified at the penalty phase about various incidents in which he "snapped," but did not because she was not properly prepared to testify since his attorneys' strategy was to present Thompson's "positive qualities." In any case, despite defense counsel's apparent strategy, Cajulao testified on direct examination about Thompson's "paranoid" behavior in the Navy after he was assaulted by three men with a crowbar and about his discharge from the Navy resulting from the incident in which Thompson pushed an officer, dislocating the officer's shoulder or breaking his collarbone. Cajulao also was forced on cross-examination to testify about Thompson's involvement in other violent incidents while in the Navy, which included threats to assault Navy personnel with a torque wrench extension bar and a five-inch steak knife.

As already noted, defense trial counsel was aware of Thompson's violent behavior in the military. Thus, defense trial counsel was presented with the problem of how to account for Thompson's violent behavior in light of their chosen strategy of presenting his "positive qualities." Nevertheless, Thompson's trial counsel Parsons realized that there was a puzzling change in Thompson's behavior from the time he lived in Georgia before joining the Navy, wherein Thompson went from being "non-violent, cooperative and responsible" and "pleasant, easy-going, cheerful" to a "paranoid" individual apt to engage in violent assaultive behavior. Although trial counsel offered no explanation for Thompson's radical behavioral change, there was evidence, as Dr. Blair recognized, indicating that Thompson had a history of head injuries and that since 1985, he had shown a deteriorating mental status, becoming psychotic, with mood swings indicative of bipolar disorder

or schizo affective disorder or schizophrenia. In her testimony at the post-conviction hearing, Dr. Blair intimated that Thompson's troubles in the Navy just before the crime in this case suggested that he was becoming mentally ill at that time. Notwithstanding the evidence regarding the marked change in Thompson's behavior during his time in the Navy, along with well-founded questions about his possible mental illness, trial counsel was simply not in the position to exploit this evidence on behalf of Thompson's defense. Again, the reason why Thompson's trial counsel could not avail themselves of this evidence was a direct consequence of their own failure to hire an appropriate psychiatric expert in this case. They therefore could not present the jury with a plausible explanation in psychiatric terms as to why Thompson's behavior had changed so markedly. Viewed in this way, then, trial counsel's strategy of only presenting Thompson's "positive qualities" must be seen in the context of this case as tantamount to presenting no defense for him at all. Trial counsel's strategy actually resulted in the introduction, by way of rebuttal, of additional damaging evidence against Thompson.

Contrary to defense trial counsel's characterization, this case did not present them with a Hobson's choice of offering only evidence of Thompson's "positive qualities" or no evidence at all in the penalty phase. Indeed, by accounting for the marked change in Thompson's behavior after he joined the Navy, expert psychiatric testimony supporting the notion that Thompson suffered from mental illness or an adverse mental condition would have provided a plausible explanation for Thompson's "positive qualities" in contradistinction to his subsequent violent behavior. However, by not being able to offer the jury any

plausible psychiatric explanation regarding the significance of Thompson's change in behavior as witnessed by Cajulao and others, his trial counsel essentially abdicated their roles as meaningful advocates on behalf of their client. This is because defense counsel had nothing with which to rebut the state's proofs after opening the door to the issue of whether Thompson was a "good person."

In summary, the performance of Thompson's trial attorneys in this capital case was well below an objective standard of reasonableness demanded by the Sixth Amendment. Here, trial counsel rendered nugatory the protections afforded by the Due Process Clause by failing to hire an appropriate psychiatric expert as directed by the trial court's order pursuant to *Ake*. As a result of their own error in failing to hire an appropriate psychiatric expert to respond to the state's psychiatric evidence and to assist the defense, trial counsel availed themselves of the purported strategy of presenting no defense at the guilt phase and of offering Thompson's "positive qualities" as mitigating evidence in the penalty phase without attempting to provide a plausible psychiatric explanation for Thompson's anti-social and criminal behavior.

The lead opinion's reasoning that Thompson's trial counsel cannot be found to have acted unreasonably because there was no proof of Thompson's mental illness at the time of the crime, is circular and unpersuasive. Indeed, without the proper psychiatric assistance to adduce evidence of Thompson's mental condition, no proof could be offered. Thus, counsel's strategy simply amounted to no strategy at all and permeated these entire proceedings *ab initio,* depriving Thompson of the ability to mount any defense in the guilt phase and to present important mitigating evidence about his mental condition at the

penalty phase. In so doing, trial counsel left their client virtually defenseless, as though he were without any representation, facing the charges and a death sentence on his own.

B. The Prejudice Prong under *Strickland*

Having concluded that trial counsel's performance was deficient in both the guilt and penalty phases of this case, the next question is whether there was prejudice. To establish prejudice under *Strickland,* Thompson must show that "there is a reasonable probability, absent the errors, that the factfinder would have had a reasonable doubt respecting guilt" and that "there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695.

On the present record, there does not appear to be a reasonable probability that, but for trial counsel's thoroughly deficient performance, the jury would have had a reasonable doubt about Thompson's guilt. As Thompson's trial attorneys recognized, there was overwhelming evidence that he committed the murder. While there was no apparent defense to Thompson's factual guilt, the question still remains whether his trial counsel could have mounted an effective psychiatric defense in the guilt phase by showing that he was under some psychiatric or psychological impairment at the time of the murder. In this regard, it should be noted that the record seemed to suggest that Thompson was competent at the time of trial. Dr. Crown, while not asked to give an opinion about whether Thompson was competent during his state trial,

opined that Thompson was competent at the time of his examination on June 12, 1998. Dr. Blair testified about Thompson's deteriorating mental condition since 1985 and suggested that he was likely suffering from schizophrenia at the time of the crime. However, she declined to render a formal opinion about Thompson's mental condition at the time of the crime, claiming that she needed more information about Thompson's background before she could render such an opinion. Thus, there is nothing in the present record to indicate that Thompson was not competent at the time of the murder, or to show that he was suffering from some form of organic brain damage or mental illness at the time of the murder.

Because the evidence does not sufficiently indicate that Thompson was under some psychiatric or psychological impairment at the time of the crime so as to absolve him of criminal culpability, it is unclear whether Thompson would have been able to mount an effective psychiatric defense at the guilt phase if his trial counsel had secured the services of an appropriate psychiatric expert. Although Thompson had suffered some head injuries and experienced mental instability during the time of his service in the Navy, and though his mental condition may have continued to decline subsequent to the crime, the present record does not allow us to conclude whether the assistance of an appropriate psychiatric expert would have altered the outcome of the guilt phase of Thompson's trial.

On the other hand, there certainly is reasonable probability that, but for trial counsel's deficiencies at the penalty phase of the trial, the jury would have concluded that the death sentence was not warranted in this case. It is well-established that at the sentencing phase of a

capital trial, the jury must consider the facts and circumstances of the crime and the character and background of the defendant. *Lockett v. Ohio,* 438 U.S. 586, 604 (1978); *Austin,* 126 F.3d at 848. As this Court noted in *Coe:*

> We have previously had occasion to explore the nature of the Tennessee death penalty process:
>
> Tennessee is a "weighing" state – that is, the jury determines whether any aggravating circumstances have been established beyond a reasonable doubt by the State and then balances this against any mitigating circumstances found by the individual jurors. If the jury unanimously finds that the aggravators outweigh the mitigators, death must be imposed.

Coe, 161 F.3d at 332 (quoting *Houston v. Dutton,* 50 F.3d 381, 387 (6th Cir. 1995)).

Here, it seems quite likely that, but for trial counsel's objectively unreasonable strategy triggered by their failure to hire an appropriate psychiatric expert, the result at the penalty phase was likely to have been different. *See Strickland,* 466 U.S. at 700; *Mayfield v. Woodford,* 270 F.3d 915, 932 (9th Cir. 2001) ("If the jury had considered the testimony of experts in endocrinology and toxicology, or of friends and family members relating additional humanizing stories, there is a reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.") (internal quotation marks and citation omitted); *Skaggs,* 235 F.3d at 269-75 (finding that counsel's failure to find a different psychiatric expert for the penalty phase of the trial was prejudicial because it resulted in the

presentation of no mitigation evidence at all, even though the defendant suffered from mild mental retardation and diminished capacity); *Glenn,* 71 F.3d at 1210-11 (holding that counsel's failure to present pertinent evidence of mental history and mental capacity was prejudicial).

Although in the absence of competent psychiatric testimony there was insufficient evidence showing that Thompson was suffering from some psychiatric or psychological impairment at the time of the crime, there was, on the other hand, sufficient record testimony indicating that his mental condition has deteriorated since 1985. As Dr. Blair pointed out in her testimony at the post-conviction evidentiary hearing, three psychiatrists who treated or examined Thompson from 1985 to 1990 diagnosed him as either having a bipolar disorder or a schizoaffective disorder or schizophrenia. According to Dr. Blair, "there was some question as to whether [Thompson] accurately fit the diagnostic criteria for [schizoaffective] disorder or schizophrenia or a bipolar disorder, all of which usually begin in early adulthood." Further, on the basis of the reports of the mental health professionals treating Thompson since the late 1980s, Dr. Crown concluded that Thompson suffered from some form of organic brain damage, which was secondary to a "schizo-affective disorder, bipolar subtype." Given what the evidence about Thompson's deteriorating mental condition after the crime suggests about his mental condition at the time of the crime, there is reasonable probability that, but for trial counsel's failure to obtain appropriate psychiatric assistance so as to investigate and present mitigating evidence regarding the marked change in Thompson's behavior during his time in the Navy and his possible mental illness, the jury would have concluded by balancing the

aggravating and mitigating circumstances that the death sentence was not warranted.

In this case, the availability of psychiatric expert testimony that, at the time of the crime or at the time of the trial, Thompson suffered from some form of psychiatric disorder, including perhaps even organic brain disorder or bipolar disorder, schizo affective disorder or schizophrenia, would have presented the jury with a far more sympathetic figure – which would likely have altered the conclusion that the aggravating circumstances outweighed the mitigating circumstances. Accordingly, there can be no confidence in the reliability of the death sentence imposed in this case because there is a reasonable probability that, but for trial counsel's deficient performance at the penalty phase of the trial, the jury would not have recommended the death penalty. *See Austin,* 126 F.3d at 849 (holding that "[counsel's] failure to investigate or present any mitigating evidence undermined the adversarial process and rendered the death sentence unreliable").

III. Conclusion

Regardless of evidence presented against Thompson at the guilt phase, trial counsel's deficient performance sealed his fate at the penalty phase. Instead of making extraordinary efforts as prescribed by ABA standards, *Combs,* 205 F.3d at 289-90, trial counsel's performance on Thompson's behalf at the penalty phase was not merely ineffectual, but positively detrimental to his cause. To hold that AEDPA compels us to uphold the patently unreasonable action of Thompson's trial attorneys under its presumed interpretative strictures is to misrepresent AEDPA. The result in *Williams v. Taylor,* 529 U.S. 362 (2000)

supports the view that the state court's application of *Strickland* was more than incorrect; it was in fact unreasonable, thereby satisfying the requirements of AEDPA. This is so because a competent attorney unquestionably would have obtained a suitable expert in a capital offense case such as this. To hold otherwise, as the state court did, constitutes an unreasonable application of *Strickland* because, as a consequence of trial counsel's error, the jury was not given the opportunity to consider evidence about Thompson's deteriorating mental condition after he was discharged from the Navy, which might have caused the jury to recommend the option of life imprisonment without parole instead of the death penalty. Considering the highly prejudicial consequences of the unreasonable strategy of Thompson's trial counsel flowing from their error in failing to hire the proper expert to examine Thompson, it is clear that the state court's application of *Strickland* was unreasonable.

For the foregoing reasons, I would therefore reverse the district court's judgment granting summary judgment to Warden Bell and remand to the district court with instructions to issue a writ of habeas corpus vacating Thompson's death sentence unless the State of Tennessee conducts a new penalty trial proceeding within 180 days of remand, while providing Thompson with the appropriate psychiatric services necessary to assist the defense in the presentation of mitigating evidence as guaranteed to Thompson by the Constitution.